77-444

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC., *Appellants,*

v.

THE CITY OF NEW YORK, *et al., Appellees.*

On Appeal from the Court of Appeals of New York

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

No. 273

PENN CENTRAL TRANSPORTATION COMPANY, ET AL.,

and

UGP PROPERTIES, INC., *Appellants,*

vs.

THE CITY OF NEW YORK, ET AL., *Respondents.*

BREITEL, Ch. J.:

In broad terms, the problem in this case is determining the scope of governmental power, within the Constitution, to preserve, without resorting to eminent domain, irreplaceable landmarks deemed to be of inestimable social or cultural significance. In controversy is the constitutionality of regulation which would prohibit appellants, owner and proposed developer of the air rights above Grand Central Terminal, from constructing an office building atop the Terminal.

Undisputed is the principle, rooted in the Due Process Clause of the Constitution, that government may not, by regulation, deprive a property owner of all reasonable return on his property. There are two issues nevertheless. The first is the extent to which government, when regulating private property, must assure what is described as a reasonable return on that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect

social and direct governmental investment in the physical property, its functions, and its surroundings. The second issue is whether above-the-surface development rights, transferable to adjacent sites under the city landmark ordinance, may be considered in computing return on the property when the landmark property and some of the sites to which the rights may be transferred share a common owner.

Plaintiffs, Penn Central Transportation Company and its affiliates, who have a fee interest in Grand Central Terminal, and UGP Properties, Inc., lessee of the development rights over the Terminal, seek a declaration that the landmark preservation provisions of the Administrative Code of the City of New York, as applied to the terminal property, are unconstitutional. They also seek to enjoin defendants, the City of New York and the City Landmark Preservation Commission, from enforcing those provisions against the subject property. Trial Term granted the requested relief, but a divided Appellate Division reversed and granted judgment to defendants. Plaintiffs appeal.

The order of the Appellate Division should be affirmed. Although government regulation is invalid if it denies a property owner all reasonable return, there is no constitutional imperative that the return embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests. So many of these attributes are not the result of private effort or investment but of opportunities for the utilization or exploitation which an organized society offers to any private enterprise, especially to a public utility, favored by government and the public. These, too, constitute a background of massive social and governmental investment in the organized community without which the private enterprise could neither exist nor prosper. It is enough, for the limited purposes of a

landmarking statute, albeit it is also essential, that the privately created ingredient of property receive a reasonable return. It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.

Moreover, in this case, the challenged regulation provides Penn Central with transferable above-the-surface development rights which, because they may be attached to specific parcels of property, some already owned by Penn Central or its affiliates, may be considered as part of the owner's return on the terminal property.

Thus, the regulation does not deprive plaintiffs of property without due process of law, and should be upheld as a valid exercise of the police power.

Grand Central Terminal was formally opened to the public in 1913. Undisputed is its architectural, historical and cultural significance (for further detail, see opn at App Div, 50 AD2d 265, 269). On August 2, 1967, in accordance with the provisions of the New York City Administrative Code, the Terminal was designated a landmark by the Landmarks Preservation Commission, and the designation was confirmed by the Board of Estimate on September 21, 1967 (see Administrative Code of City of New York, § 207-2.0).

On July 18, 1968, plaintiffs submitted to the Landmarks Preservation Commission an application for a permit to construct the proposed office building, seeking a certificate that the work would have no exterior effect on protected architectural features (Administrative Code, § 207-5.0). The request was denied on September 20, 1968. Then plaintiffs applied to the Commission for a certificate that the proposed building, even if it would have had an

exterior effect, was appropriate to the site (Administrative Code, § 207-6.0). Three separate alternative proposals, each calling for erection of a substantial office building atop the Terminal, were submitted. On August 26, 1969, the certificate of appropriateness was denied. Not involved, because not raised in light of the denial of a certificate of appropriateness, are the plans for the interior of the Terminal. None of these administrative determinations was ever directly challenged in the courts (cf. *Lutheran Church in America* v. *City of New York,* 35 NY2d 121, 126-128).

Instead, on October 7, 1969, plaintiffs brought this action seeking judicial invalidation of the landmark preservation provisions of the Administrative Code as applied to the Terminal. Plaintiffs also sought damages for a temporary "taking" of property from the time of original designation as a landmark to the time of the requested judicial invalidation. Of course, any so-called temporary "taking" is more accurately described as a deprivation of property without due process of law (*Fred F. French Investing Co.* v. *City of New York,* 39 NY2d 587, 593-595, app dsmd —— US ——).

Trial court found the landmark preservation provisions, as applied, constitutionally deficient, but severed the question of damages. As noted, the Appellate Division, with two dissenters, reversed, and granted judgment to defendants.

This is not a zoning case. In many ways, the restrictions imposed on the use of the property are similar to zoning restrictions, but the purposes are different, and in determining whether regulation is reasonable, the purposes behind the regulation assume considerable significance (*id.,* p 596). Zoning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefited and restricted from exploitation, presumably without dis-

crimination except for permitted continuing non-conforming uses. The restrictions may be designed to maintain the general character of the area, or to assure orderly development, objectives inuring to the benefit of all, which property owners acting individually would find difficult or impossible to achieve (see, e.g., *Berenson* v. *Town of New Castle,* 38 NY2d 102, 109-110; *Matter of 113 Hillside Ave. Corp. v. Zaino,* 27 N.Y.2d 258, 262-263).

Nor does this case involve landmark regulation of a historic district. Historic district regulation, like zoning regulation, may be designed to maintain the character, both economic and esthetic or cultural, of an area (see *Maher* v. *City of New Orleans,* 516 F2d 1051, esp p 1060, cert den 426 US 905; Opinion of the Justices to the Senate, 333 Mass 773, 778-780). The difference, generally, is that zoning does this largely by regulating construction of new buildings, while historic district regulation concentrates instead on preventing alteration or demolition of existing structures. In each case, owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan.

Nor does this case partake of the principles applicable to a taking in eminent domain. As noted earlier, there is no taking for which just compensation must be paid. And it is the concept of just compensation which is so integrally related to value based on return. Instead, landmark regulation is a limitation on exploitation of property, an attribute shared with the classifications of zoning and historic districting. Yet landmark regulation is different because the burden of limitation is borne by a single owner. He may or may not benefit from that limitation but his neighbors most likely will. In contrast both an owner and his neighbors benefit to some degree and in some manner from zoning and historic districting.

Restrictions on alteration of individual landmarks are not designed to further a general community plan. Land-

mark restrictions are designed to prevent alteration or demolition of a single piece of property. To this extent, such restrictions resemble "discriminatory" zoning restrictions, properly condemned, affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations (see *Udell* v. *Haas*, 21 NY2d 463, 476-478). There is, however, a significant difference. Discriminatory zoning is condemned because there is no acceptable reason for singling out one particular parcel for different and less favorable treatment. When landmark regulation is involved, there is such a reason: the cultural, architectural, historical, or social significance attached to the affected parcel. Even when regulation is designed to achieve such an acceptable purpose, however, the landowner must be allowed a reasonable return or equivalent private use of his property (cf. *Fred F. French Investing Co.* v. *City of New York*, 39 NY2d 587, 596, *supra*). That is, in the case of commercial property, the owner must be assured of a continued reasonable return on the property.

Reasonable return, however, is an elusive concept, incapable of easy definition. For the reasonableness of the return must be based on the value of the property, and the value of the property necessarily depends on the return permitted or available. The inevitable circularity of reasoning is obvious (see Berger, The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis, 76 Col L Rev 799, 818-819). In most landmark cases, however, it is acceptable to use alternative bases of valuation, assessed valuation perhaps, as a basis for determining the reasonableness of return (see Administrative Code, § 207-1.0, subd [v]). At best, the computation is rough and successful if it is fairly approximate. In considering reasonable return the owner's desire to expand the property physically or functionally affects the base upon which the return is to be computed. Again, there may be a circularity of cause and effect.

Grand Central Terminal is no ordinary landmark. It may be true that no property has economic value in the absence of the society around it, but how much more true it is of a railroad terminal, set amid a metropolitan population, and entirely dependent on a heavy traffic of travelers to make it an economically feasible operation. Without people Grand Central would never have been a successful railroad terminal, and without the Terminal, a major transportation center, the proposed building site would be much less desirable for an office building.

Of course it may be argued that had Grand Central Terminal never been built, the area would not have developed as it has. Thus, the argument runs, construction of the Terminal triggered growth of the area, and created much of the terminal property's current value. Indeed, the argument has some validity. But, in reality, it is of little moment which comes first, the Terminal or the travelers. For it is the interaction of economic influences in the greatest megalopolis of the western hemisphere—the Terminal initially drawing people to the area, and the society developing the area with shops, hotels, office buildings, and unmatched civic services—that has made the property so valuable. Neither factor alone accounts for the increase in the property's value; both, in tandem, have contributed to the increase.

Of primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property. Although recent financial troubles and consequent governmental assistance make the fact more apparent, railroads have always been a franchised and regulated public utility, favored monopolies at public expense, subsidy, and with limited powers of eminent domain, without which their existence and character would not have been possible (cf. *Ball v. New York Cent. R.R.*, 229 NY 33, 43; *Schaghti-*

coke Powder Co. v. *Greenwich & J. Ry.*, 183 NY 306, 316). Even in the best of times, railroads were dependent on government-granted monopolies for their rights of way, government grants for their land, and government assistance for such projects as grade crossing eliminations. Railroads were given franchises to use city streets without charge, often to the detriment of neighboring residents and often without leaving the city power to terminate the franchise (cf. *Kellinger* v. *Forty-Second Street R.R.*, 50 N.Y. 206, 210, 212; *New York Cent. & H.R. R.R.* v. *City of New York*, 202 NY 212, 221-224). Through the years, Penn Central and its predecessors have benefited mightily from this assistance. Today, government influence is even more pervasive, extending even to the real estate tax exemption enjoyed by Grand Central Terminal itself (Real Property Tax Law, § 489-ff).

Government has aided the Terminal in less direct ways, as well. It is no accident that much of the city's mass transportation system converges on Grand Central. Numerous subways and bus routes pass through or near the Terminal. Without the assistance of the city's transit system, now municipally owned and subsidized, the property, with or without a towering office structure atop it, would be of considerably decreased value. It is true that most city property benefits to some extent from public transportation, but the benefit is peculiary concentrated and great in the area surrounding Grand Central Terminal.

Absent this heavy public governmental investment in the Terminal, the railroads, and connecting transportation, it is indisputable that the Terminal property would be worth but a fraction of its current economic value. Plaintiffs may not now frustrate legitimate and important social objectives by complaining, in essence, that government regulation deprives them of a return on so much of the investment made not by private interests but by the people of the city and state through their government. In-

stead, to prevail, plaintiffs must establish that there was no possibiliy of earning a reasonable return on the privately contributed ingredient of the property's value.

To put the matter another way, the massive and indistinguishable public, governmental, and private contributions to a landmark like the Grand Central Terminal are inseparably joint, and for most of its existence, made both the Terminal and the railroads of which it was an integral part, a great financial success for generations of stockholders and bondholders. Their investment has long been eliminated or impaired by the recent vicissitudes of the Penn Central complex. It is exceedingly difficult but imperative, nevertheless, to sort out the merged ingredients and to assess the rights and responsibilities of owner and society. A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad. The historical, cultural, and architectural resource that remains was neither created solely by the private owner nor solely by the society in which it was permitted to evolve.

Plaintiffs contend that the Terminal currently operates at a loss. Even if that be true, it is not of critical importance. What is significant, instead, is whether the property, managed efficiently, is capable of producing a reasonable return. If the courts were forced to look to the property as it is, rather than as it could be, any inadequacy of managers of property could frustrate any land use restrictions.

Perhaps of greater importance, the property may be capable of producing a reasonable return for its owners even if it can never operate at a profit. For it should be evident that plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the Terminal not in operation.

Some of this income must, realistically, be imputed to the Terminal.

The situation is analogous to that of a flagship store in a regional shopping center. The flagship store may not produce enough income to justify its construction or maintenance, but it may draw enough customers into the other, smaller stores, to make its operation worthwhile, and to extract concessions from the owners of the remainder of the center (see *G.R.F., Inc.* v *Board of Assessors*, 41 NY2d 512, 514). So it is with Grand Central Terminal. The Terminal acts, in effect, as a magnet for Penn Central's other, more profitable, enterprises.

The discussion thus far is in accord with the teachings of *Lutheran Church in America* v *City of New York* (35 NY2d 121, *supra*). The Lutheran Church, owner of the landmark site, established, as plaintiffs here have not, that economic considerations did not permit maintenance of the landmark building in its existing form (*id.*, p. 132). Moreover, the Lutheran Church was a charitable institution which, over the years, did not and could not reap the same pecuniary benefits of massive governmental investment enjoyed by the railroads and Grand Central Terminal. Yet, the regulatory provisions prohibited replacement of the landmark building without any new ameliorative provisions, other than the pre-existing tax-exemption to which it had always been entitled, to assure that the property remained capable of usefulness on a reasonable economic basis. The same problem was reached and discussed in *Matter of Sailors' Snug Harbor* v *Platt* (29 AD2d 376, esp p 378). In recognizing the invalidity of the landmark regulation as applied to Lutheran Church, however, this court, as had the court in the *Sailors' Snug Harbor* case (*supra*), declined to strike down the landmarks preservation provisions of the city administrative code (*id.*, pp. 131-132). In this case, by contrast, there has been no showing that the property,

owned not by a charitable enterprise but by an entity existing to make a profit, is incapable in its economic context of producing a reasonable return, even if its development is limited.

Moreover, plaintiffs have not been wholly deprived of the development rights above the Terminal. Those rights have been made transferable to other parcels of land in the vicinity, at least eight of them owned by Penn Central, including the sites of the Biltmore, Commodore, Barclay, and Roosevelt Hotels.

The many defects in New York City's program for development rights transfers have been detailed elsewhere (Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv L Rev 574, 585-589). The area to which transfer is permitted is severely limited, complex procedures are required to obtain a transfer permit, and the program, it has been said, has the unfortunate consequence of encouraging large, bulky buildings around landmarks which are dwarfed by comparison. But the possibility that a better program could have been devised does not preclude analysis and justification of the existing one in this particular application.

That several of the potential receiving parcels are encumbered by long-term leases or currently improved with suitable buildings does not make the development rights worthless. The knowledge that at some future time, when the lease term has run out or the improvements have lost their utility, a larger building could be constructed, should increase the value of the building plot, at least so long as there is a market demand for new construction (see Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Col L Rev 1021, 1067).

Moreover, in this case, construction of new office buildings was at least given serious consideration on two of the available receiving parcels, the sites of the Biltmore and Roosevelt Hotels. Defendants contend that the alternative sites, and particularly the Biltmore site, are better suited for office building construction than even the Terminal site. But that is beside the point. Important instead is the availability of receiving parcels, in common ownership with the landmark site, on which the development rights, or some of them, could be used. It is significant, as well, that the challenged regulation permitted splitting of the development rights among several receiving parcels, to allow optimal use of the rights.

Development rights, once transferred, may not be equivalent in value to development rights on the original site. But that, alone, does not mean that the substitution of rights amounts to a deprivation of property without due process of law. Land use regulation often diminishes the value of the property to the landowner. Constitutional standards, however, are offended only when that diminution leaves the owner with no reasonable use of the property. The situation with transferable development rights is analogous. If the substitute rights received provide reasonable compensation for a landowner forced to relinguish development rights on a landmark site, there has been no deprivation of due process. The compensation need not be the "just" compensation required in eminent domain, for there has been no attempt to take property (see *Fred F. French Investing Co.* v *City of New York*, 39 NY2d 587, 595, *supra;* cf. Costonis, "Fair" Compensation and the Accomodation Power, 75 Col L Rev 1021, 1061-1070, *supra*).

The case at bar, like the *Fred French* case (*supra*), fits neatly into this analysis. In *Fred French* the development rights on the original site were quite valuable. The regulations deprived the original site of any possibility

of producing a reasonable return, since only park uses were permitted on the land. And, the transferable development rights were left in legal limbo, not readily attachable to any other property, due to a lack of common ownership of the rights and suitable site for using them. Hence, plaintiffs were deprived of property without due process of law. The regulation of Grand Central Terminal, by contrast, permitted productive use of the Terminal site as it had been used for more than half a century, as a railroad terminal. In addition, the development rights were made transferable to numerous sites in the vicinity of the Terminal, several owned by Penn Central, and at least one or two suitable for construction of office buildings. Since this regulation and substitution was reasonable, no due process violation resulted.

To recapitulate, a property owner is not absolutely entitled to receive a return on so much of the property's value as was created by social investment. And, even as to the privately created ingredient of the property's value, a plaintiff seeking to show that an otherwise reasonable land use regulation constitutes a deprivation of due process of law must demonstrate affirmatively that the regulation eliminates all reasonable return (see *Mary Chess, Inc.* v *City of Glen Cove,* 18 NY2d 205, 209-210; *Shepard* v *Village of Skaneateles,* 300 NY 115, 118). Plaintiffs in this case have failed to meet that burden. In none of their analyses do they include the benefits provided to Penn Central's varied real estate holdings by the Terminal's operation. These real, albeit indirect, benefits alone might suffice to provide Penn Central with a reasonable return. But there is more. The development rights above Grand Central Terminal have been made transferable, and could be transferred to several sites owned by Penn Central and suitable for office building construction. These substitute rights are valuable, and provide significant, perhaps "fair", compensation for the loss of rights

above the Terminal itself. Hence, no constitutional violation has been established.

In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future. The landmark preservation provisions of the Administrative Code represent an effort to take a middle way (Marcus, Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks, 24 Buff L Rev 77, 78, 107-110). The statute needs improvement. In some cases it protects property owners inadequately (*Lutheran Church in America* v *City of New York,* 35 NY2d 121, *supra*). But, in its generality and as applied to Grand Central Terminal, the statute does not deprive plaintiffs of due process of law.

In concluding the analysis, it is recognized that one does not pursue a path guided by ample precedent or wholly developed principles. The area is not merely difficult; it has at present viewing impenetrable densities. The last word has not only not been spoken; it has hardly been envisaged. For this case, and for the cases which may follow in its wake, deference to the unknown must be accorded. Moreover, the analysis has not been one which had been fully developed in the valuable presentations by counsel either at nisi prius, the Appellate Division, or in this court. In fairness then, and in order to assure that the better application of the rule be evolved, if counsel be so advised, they should be entitled to present at nisi prius any additional submissions which, in the light of this opinion, may usefully develop further the factors discussed. On the present record, however, the result directed by the Appellate Division is correct and in accordance with the views expressed in this opinion.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Breitel, Ch.J. All concur.

Decided June 23, 1977

APPENDIX B

(1)

Supreme Court, Appellate Division, First Department

Dec. 16, 1975

PENN CENTRAL TRANSPORTATION COMPANY et al., *Plaintiffs-Respondents,*

v.

The CITY OF NEW YORK and the Landmarks Preservation Commission of the City of New York, *Defendants-Appellants.*

Before STEVENS, P. J., and MARKEWICH, KUPPERMAN, MURPHY and LUPIANO, JJ.

MURPHY, *Justice.*

Defendants have thus far been more successful, at the appellate level, in repelling a direct frontal attack on the constitutionality of the New York City Landmarks Preservation Law (New York City Charter and Admin. Code, ch. 8-A) than in applying it to a given factual situation. (*Cf. Lutheran Church v. City of New York,* 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305; *Mtr. of Trustees of Sailors' Snug Harbor v. Platt,* 29 A.D.2d 376, 288 N.Y.S.2d 314.) A majority of us now feels that the time for its full implementation has arrived.

The specific issue presented in this case is whether, as applied to these plaintiffs, the City's Landmarks Preservation Law and the action of defendants thereunder with respect to certain property commonly known as the Grand Central Terminal are unconstitutional. Trial Term responded affirmatively on the grounds that plaintiffs' private

property was taken for public use without just compensation and that they were deprived of due process and equal protection of the laws. We disagree.

In recent years, as we have become painfully aware that "the frontier" has been disappearing and our natural resources are rapidly being depleted, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance.

These changing attitudes now acknowledge that "[u]rban landmarks merit recognition as an imperiled species alongside the ocelot and the snow leopard. Over fifty per cent of the 12,000 buildings listed in the Historic American Buildings Survey, commenced by the federal government in 1933, have been razed. The threat to the remainder continues undiminished as the recent loss of Chicago's Old Stock Exchange and the precarious status of New York's Grand Central Terminal attest. If this trend is not reversed the nation at its bicentennial in 1976 will mourn the loss of an essential part of its architectural and cultural heritage rather than celebrate the visible evidence of its past." (The Chicago Plan: Incentive Zoning and The Preservation of Urban Landmarks, 85 Harv.L.Rev. 574-5.)

Since 1966 Congress has passed major new laws furthering historic preservation. (See Gray, The Response of Federal Legislation to Historic Preservation, 36 Law & Cont. Prob. 314.) The National Historic Preservation Act of 1966 found and declared "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." (16 U.S.C. § 470(b).)

Though "fraught with trouble" (*Lutheran Church v. City of New York,* 35 N.Y.2d 121, 131, 359 N.Y.S.2d 7, 15, 316 N.E.2d 305, 311), the preservation of landmarks in urban areas is of special importance. Great cities have always been

havens for educational and cultural activities. New York's rich history is reflective of the great deal of time, money and talent invested in building its own architectural heritage. Structures such as the Brooklyn Bridge, the Metropolitan Museum of Art, the New York Public Library and Grand Central Terminal are important and irreplaceable components of the special uniqueness of New York City. We have already witnessed the demise of the old Metropolitan Opera House (see *Matter of Keystone Assoc. v. Moerdler,* 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700) and the original Pennsylvania Station. Stripped of its remaining historically unique structures, New York City would be indistinguishable from any other large metropolis.

Following the evolving national trend, New York City, in 1965 provided for landmark preservation by adding Chapter 8-A to its Administrative Code, pursuant to enabling legislation adopted by the State nine years earlier (former Gen. City Law, § 20(25-a), now Gen.Mun.Law, § 96-a.) The Council "declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people"; and established, as the purpose of the chapter, *inter alia:* "the protection, enhancement and perpetuation of such improvements and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history," the safeguarding of "the city's historic, aesthetic and cultural heritage", the fostering of "civic pride in the beauty and noble accomplishments of the past," the protection of "the city's attractions to tourists and visitors" and the promotion of "the use of historic districts and landmarks for the education, pleasure and welfare of the people of the city." (Admin. Code, § 205-1.0.)

Briefly stated, the Landmarks Preservation Law provides for the establishment of a commission which, after a public

hearing, proposes to the Board of Estimate the designation of landmark properties and historic districts. The Board approves, disapproves or modifies the designation after receipt of a report from the City Planning Commission. (*Id.*, § 207-2.0.)

Once a landmark is so designated it must be kept "in good repair" (*Id.*, § 207-10.0) and any alteration, construction or demolition of an improvement on the site is regulated. (*Id.*, § 207-4.0.) Comprehensive procedures are provided for changes. A landmark owner may seek a "certificate of no exterior effect" or, if there will be such exterior effect, a "certificate of appropriateness." (*Id.*, §§ 207-5.0—207-7.0.) There is also a procedure for seeking a certificate of appropriateness on the ground of insufficient return in the case of taxpaying commercial properties; and a similar procedure, but a different form of relief, for certain tax exempt properties used for charitable purposes. (*Id.*, § 207-8.0.)

Related to the Landmarks Preservation Law are certain amendments to the New York City Zoning Resolution which permit the transfer of unused development rights over landmark properties located in certain high density areas of the City to other nearby sites. (Zoning Resolution, Sections 74-79 to 74-793.)

Grand Central Terminal is unquestionably one of New York City's best known buildings. Along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City for millions of visitors and residents. The Terminal as a whole includes a variety of architectural and engineering elements: railroad tracks and platforms; space and facilities for marshalling and handling railroad equipment; passage-ways and ramps affording access to adjacent streets, office buildings and subway stations; and concourses for the use of passengers and pedestrians passing through the Terminal. The Main Con-

course, probably the Terminal's most striking feature, is a large room 120 × 375 feet, with a ceiling 125 feet high at its apex.

From its formal opening to the public in 1913 (as a replacement for the "Grand Central Depot" built by Cornelius Vanderbilt in 1871) the Terminal has been recognized not only for its architecture, but as a superb example of comprehensive urban design. The complete submergence of all the tracks and a double level track system not only resulted in the accommodation of more trains without the acquisition of more land, but permitted construction of revenue-producing buildings on air rights over the railroad tracks and the development of Park Avenue as one of this nation's most prestigious residential communities. (See, Grand Central Terminal and Rockefeller Center: A Historical Critical Estimate of Their Significance, by Fitch and Waite, published by the New York State Parks and Recreation Division for Historic Preservation [1974].) Today, although somewhat neglected over the years, Grand Central Terminal still remains a splendid edifice and a major part of the cultural and architectural heritage of New York City.

On August 2, 1967, after a public hearing and over objection of plaintiff Penn Central Transportation Company ("Penn Central"), the Landmarks Preservation Commission proposed the designation of Grand Central Terminal as a landmark, predicated on the following findings:

> "On the basis of a careful consideration of the history, the architecture and other features of this building the [Commission] finds that Grand Central Terminal has a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City.
>
> "The Commission further finds that, among its important qualities, Grand Central Terminal is a magnificent example of French Beaux Arts architecture; that it is one of the great buildings of America, that it represents a creative engineering solution of a very difficult problem, combined with artistic splendor; that as an American Railroad Station it is unique in quality, distinction and character; and that this building plays a significant role in the life and development of New York City."

It is worthy of note, in such connection, that the Amtrak Improvement Act of 1974 (88 U.S.Stat. 1526), in accordance with the Congressional declaration that it is national policy to preserve historic sites, seeks to encourage the preservation of passenger railroad terminals of special significance and architectural quality, such as Grand Central Terminal, by authorizing the Secretary of Transportation to provide them with financial and other assistance. (49 U.S.C. § 1653.)

Plaintiff Penn Central (including, for the purposes hereof, its subsidiaries plaintiffs The New York and Harlem Railroad Company and The 51st Street Realty Corporation) is the successor to the New York Central Railroad Company and the Pennsylvania Railroad. Plaintiff UGP Properties, Inc. ("UGP"), which was incorporated after the landmark designation here in issue, is a wholly-owned subsidiary of a British company.

Penn Central's losses over the last several years brought it to insolvency and bankruptcy. In order to minimize such losses and provide offsetting revenues, it entered into a lease with UGP in January, 1968, pursuant to which UGP was to erect a tower exceeding 50 stories over the Terminal. UGP undertook to pay to Penn Central $1,000,000 per year during construction and thereafter an amount that was guaranteed to equal not less than $3,000,000 annually. In addition, UGP assumed a portion of Penn Central's real estate taxes estimated at $578,500. These rental payments were to be offset in part by the elimination of approximately

$700,000 to $1,000,000 in net rents presently received from concessionaires whose space would be occupied by the proposed new building. Commencing in July, 1968, plaintiffs submitted several building designs prepared by the architectural firm of Marcel Breuer & Associates to the Landmarks Commission (called Breuer I, Breuer II and Breuer II Revised) and requested an appropriate certificate (of no exterior effect or of appropriateness). Plaintiffs appear to have indicated a preference for Breuer II Revised, which would have preserved the Terminal's Main Concourse, but not its famous south facade. On August 29, 1969, a certificate of appropriateness was denied.

Since Grand Central Terminal receives partial real estate tax exemption (Real Property Tax Law, § 489-ff), no further administrative remedy, in the form of relief on the ground of economic hardship, was available to it. (Admin. Code, § 207-8.0.) The instant action, seeking declaratory and injunctive relief from the Landmarks Law, on its face and as applied, as well as compensation for the temporary taking (between the landmark designation and its expected judicial invalidation), was commenced. The trial court severed the cause of action for damages and, as above indicated, entered judgment declaring the Landmarks Law, as applied to plaintiffs, unconstitutional and permanently enjoined defendants from acting thereunder to prevent the construction of a lawful improvement on the terminal site. For the reasons hereinbelow stated, such determination should be reversed.

Although the apparent basis for the Trial Judge's decision is the found presence of "such elements as economic hardship, lack of compensatory alternative to alleviate economic hardship, inadequacy of relief by tax rebate, etc., etc.", the rationale would seem to be stated in the penultimate paragraph of his opinion:

> "The point of decision here is that the authorities empowered to make the designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers."

Such language suggests (in accordance with the interpretation by the court below of the holding in *Lutheran Church v. City of New York, supra*) that any regulation of private property to protect landmark values constitutes a compensable taking. Such holding would surely, as the *amicus* brief submitted hereon states, "eviscerate New York's Landmarks Preservation Law."

While the line between a compensable "taking" and a noncompensable "regulation" is sometimes difficult to discern, it nevertheless exists. (See, generally, Sax, Takings And The Police Power, 74 Yale L.J. 36.)

In *Mtr. of Trustees of Sailors' Snug Harbor v. Platt* (*supra,* 29 A.D.2d at p. 377, 288 N.Y.S.2d at p. 315), we upheld the validity of the Landmarks Preservation Law as "the right, within proper limitations, of the state to place restrictions on the use to be made by an owner of his own property for the cultural and aesthetic benefit of the community * * *." And the Court of Appeals concluded that we were "correct in refusing to declare the entire law unconstitutional on its face." (*Lutheran Church v. City of New York,* 35 N.Y.2d 121, 131, 359 N.Y.S.2d 7, 16, 316 N.E.2d 305, 311.)

The sole question to be decided, then, is whether plaintiffs have satisfactorily established that the law, as applied to them in this case, imposes such a burden as to constitute a compensable taking. Put another way, while the exercise of the police power to regulate the private use of property is not unlimited, it is for the one attacking such regulation in any given case to establish that the line separating valid regulation from confiscation has been breached.

In reaching such determination, consideration must be given to the importance of the regulation to the public good,

the reasonableness of the regulation in achieving such end and the effect of the regulation on the economic viability of the parcel involved. (*Goldblatt v. Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130.) We believe the first two requirements are met by the clearly stated purpose of the Landmarks Preservation Law and the unavailability of any reasonable alternative (short of condemnation) for the preservation of a landmark.

The remaining issue is the economic impact of the law on the particular parcel. In *Lutheran Church v. City of New York,* 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305, *supra,* the court dealt with a landmark devoted to a charitable use. Adopting a concept first enunciated by this Court (*Matter of Trustees of Sailors' Snug Harbor v. Platt,* 29 A.D.2d 376, 288 N.Y.S.2d 314, *supra*) it applied, as the standard: Does the designation "prevent or seriously interfere with the carrying out of the charitable purpose"? (35 N.Y.2d, at p. 131, 359 N.Y.S.2d, at p. 16, 316 N.E.2d, at p. 311.)

In the instant case, the landmark parcel is not devoted to a charitable purpose; and no claim is made that it cannot be used for its prime function—as a railroad terminal. Accordingly, (and as *Lutheran* implied), the test to be applied is the same as in zoning cases, *i.e.:* Have the plaintiffs demonstrated that the regulation in issue deprives them of all reasonable beneficial use of their property? (*Cf. Williams v. Town of Oyster Bay,* 32 N.Y.2d 78, 343 N.Y.S.2d 118, 295 N.E.2d 788; *Adamo v. Babylon,* 28 N.Y.2d 982, 323 N.Y.S.2d 839, 272 N.E.2d 338; *Salamar Builders Corp. v. Tuttle,* 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585.)

Plaintiffs' burden, in such connection, is to establish that they are *incapable* of obtaining a reasonable return from Grand Central Terminal operations, not that they are not receiving it. (*Cf. Salamar Builders Corp. v. Tuttle,* 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585, *supra; Stevens v. Town of Huntington,* 20 N.Y.2d 352, 283 N.Y.S.2d 16, 229 N.E.2d 591; *Arverne Bay Construction Co. v.*

Thatcher, 278 N.Y. 222, 15 N.E.2d 587.) In our view, such burden has not been met.

To support the claim that it is actually sustaining a loss from Terminal operations, Penn Central submitted a "Statement of Revenues and Costs" for the years 1969 and 1971. These statements, which were prepared for the instant litigation, improperly attribute a considerable amount of railroad operating expenses (and some taxes) to their real estate operations. For example, the expense items included "Station Master and Staff", "Information Clerks" and "Gate Usher'. Such huge cost items (for 1971) as "maintenance, repairs and service plant operation" ($1,141,679), "cleaning" ($632,753), "policing" ($438,566), "materials and supplies" ($69,692), and "utilities" ($660,710) were related to the entire terminal operation and not segregated as between the railroad and real estate portions thereof.

Moreover, and to compound the error, no rental value whatsoever was imputed to the vast space in the Terminal devoted to railroad purposes. (*Cf. Matter of Seagram & Sons v. Tax Comm. of City of N. Y.,* 14 N.Y.2d 314, 251 N.Y.S.2d 460, 200 N.E.2d 447.) Since Penn Central is in the passenger railroad business it, of necessity, must have a terminal (including trackage, platforms, concourse, waiting rooms, ramps, ticket windows and public amenities) for such service. The reasonable rental value of such space cannot properly be omitted from any meaningful analysis of the property's capacity to yield a reasonable return.

Obviously, if the entire expense of operating a railroad terminal is offset only by non-railroad rents generated by the commercial and concession use thereof, even the most profitable terminal will show a "deficit".

Additionally, on the record before us, plaintiffs have failed satisfactorily to show (a) an inability to increase the Terminal's commercial income by transforming vacant or under-utilized space to revenue-producing use, or (b) that

unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites (see, New York City Zoning Resolution, Sec. 74-79 *et seq.*), or (c) that Penn Central's agreements with the Metropolitan Transportation Authority and the Connecticut Transportation Authority provide a basis for invalidating the Terminal's landmark designation.

Finally, the assertion that the Landmarks Preservation Law unconstitutionally discriminates against Penn Central because, as the recipient of partial tax exemption, it is ineligible for statutory hardship relief, has already been disposed of by us. On an analogous claim in a comparable situation we hold "that this does not render the statute unconstitutional. It must be interpreted as giving power to the commission to provide relief in the situation covered by the statute, but not restricting the court from so doing in others." (*Mtr. of Sailors' Snug Harbor v. Platt,* 29 A.D.2d 376, p. 378, 288 N.Y.S.2d 314, p. 316, *supra.*)

To summarize, in view of the nationwide "burgeoning awareness that our heritage and culture are treasured national assets" (*Maher v. City of New Orleans,* 5 Cir., 516 F.2d 1051, 1060), New York City's Landmarks Preservation Law is a valid exercise of its police power. The need to preserve structures worthy of landmark status is beyond dispute; and the propriety of the landmark designation accorded Grand Central Terminal is essentially unchallenged.

Plaintiffs' burden of proving the statute unconstitutional, as applied to them, is exceedingly heavy (*Cf. I.L.F.Y. Co. v. City Rent and R. Admin.,* 11 N.Y.2d 480, 230 N.Y.S.2d 986, 184 N.E.2d 575; *Wasmuth v. Allen,* 14 N.Y.2d 391, 252 N.Y.S.2d 65, 200 N.E.2d 756); and, on the instant record, has not been met. At best, they have shown that they have been deprived of the property's most profitable use. But that is not the constitutional test. (*Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130;

United States v. Central Eureka Mining Co., 357 U.S. 155, 77 S.Ct. 1097, 2 L.Ed.2d 1228.)

The validity of the Landmarks Preservation Law, as applied to Grand Central Terminal, does not depend on a showing that the landmark parcel will be undiminished in any degree by the regulation's restrictions; only that it will not "deprive the individual property owner 'of all beneficial use of his property' * * *." (*Salamar Builders Corp. v. Tuttle,* 29 N.Y.2d 221, at p. 225, 325 N.Y.S.2d 933, at p. 937, 275 N.E.2d 585, at p. 588, *supra.*)

In short, "[p]laintiffs have shown hardship but not confiscation." (*Mary Chess, Inc. v. City of Glen Cove,* 18 N.Y.2d 205, 210, 273 N.Y.S.2d 46, 49, 219 N.E.2d 406, 409.) But such hardship, in the proper exercise of the City's police power, must be subordinated to the public weal, since such regulatory authority is not only "the least limitable of all the powers of government" (*Matter of Engelsher v. Jacobs,* 5 N.Y.2d 370, 373, 184 N.Y.S.2d 640, 642, 157 N.E.2d 626, 627, cert. den., 360 U.S. 902, 79 S.Ct. 1286, 3 L.Ed.2d 1255), but it "is not to be limited to guarding the physical or material interests of the citizen. His moral, intellectual, and spiritual needs may also be considered. The eagle is preserved, not for its use, but for its beauty." (*Barrett v. State,* 220 N.Y. 423, 428, 116 N.E. 99, 101.)

In light of the foregoing, the order and judgment of Supreme Court, New York County, entered, respectively, on January 21, 1975 and February 4, 1975, and all findings of fact and declarations of law inconsistent herewith, should be reversed, on the law and the facts, said order, judgment and findings vacated, and judgment entered declaring that plaintiffs have failed to establish that the New York City Landmarks Preservation Law is unconstitutional as applied to them, with costs.

Order and judgment, Supreme Court, New York County, entered on January 21, 1975 and February 4, 1975, and all

findings of fact and declarations of law inconsistent with the Opinion of this Court, reversed, on the law and the facts, said order, judgment and findings vacated, and judgment directed to be entered declaring that plaintiffs have failed to establish that the New York City Landmarks Preservation Law is unconstitutional as applied to them. Appellants shall recover of respondents $60 costs and disbursements of these appeals.

All concur, except MARKEWICH and LUPIANO, JJ., who dissent in an Opinion by LUPIANO, J.

Settle order on notice providing, inter alia, for new findings of fact consistent with the Opinion of this Court.

LUPIANO, *Justice* (dissenting):

The historical, aesthetic and cultural significance of Grand Central Terminal is not disputed. Similarly, the contribution of the Terminal to the uniqueness of New York City is not subject to polemics. Thus, the designation of Grand Central Terminal as a Landmark under the Landmarks Law of New York City is easily countenanced. However, the sole issue to be decided on this appeal is, as aptly phrased by Justice Murphy: "whether plaintiffs have satisfactorily established that the law, as applied to them in this case, imposes such a burden as to constitute a compensable taking". Such issue narrows down to the impact of the Landmarks Preservation Law on the particular parcel.

Plaintiff Penn Central Transportation Company ("Penn Central") has a three-hundred year lease for the Terminal. Plaintiff The New York and Harlem Railroad Company is 95% owned by the Trustees of Penn Central and is the owner of the fee. The 51st Street Realty Corporation is also a subsidiary of the Penn Central. Subsequent to the designation of the Terminal as a Landmark, agreements were entered into between Penn Central and UGP Properties,

Inc. ("UGP") under date of January 22, 1968, whereby UGP was to erect an office building, in keeping with applicable zoning laws, in and above that part of the Terminal space now occupied by the waiting room and shops along 42nd Street. UGP engaged the renowned firm of Marcel Breuer & Associates to prepare architectural designs. That firm, winner of many awards for architectural distinction (*e. g.*, awards for the Whitney Museum and the H.U.D. Headquarters Building in Washington, D.C.), designed a high-quality building in compliance with the zoning laws which would not alter the Main Concourse or any other part of the Terminal actually used in railroad operations, would provide ample access for pedestrians and, most significantly, would preserve the facade of the Terminal building (Breuer Plan I). In providing for office building space rising above the present Terminal frontage on 42nd Street and set back some 30 feet from the facade of the present building, this plan constituted a present-day application of a principle which had been embodied in the *original* plans for the present Terminal building. The original plans called for an office building to be erected over the present facade in essentially the same location as is proposed in Breuer Plan I. The difference is that, in keeping with current building capabilities and practices, the Breuer I design calls for a considerably taller building of more modern design. The removal of certain shops and advertising signs on 42nd Street and the creation of a pedestrian arcade, as envisioned by this plan, was recognized by the Landmarks Commission as considerably enhancing, "if sensitively handled, . . . the exterior of Grand Central Terminal by providing a quieter and more dignified base to support the monumental columns that rise from the ramp level. Since the suggested changes in the street level entrances would unquestionably improve pedestrian access to the Terminal and to the subway, these proposals might well be acceptable as a means of perpetuating the use of the Landmark and of protecting its main exterior architectural features". However, Breuer Plan I

was twice rejected by the Commission on applications for a Certificate of No Exterior Effect (Admin.Code § 207-5.0) and for a Certificate of Appropriateness (Admin.Code § 207-6.0) respectively. The Commission in response to the "applicant's claim that the Pan Am Building has already destroyed the silhouette of the south facade and that the proposed tower, with its granite facing, would either provide a better background or that one more tower could not do further damage" opined that the "great mass of the Breuer I tower right on top of the Terminal facade . . . would reduce the Landmark itself to the status of a curiosity". An alternative design which came to be known as Breuer II Revised was also submitted. The major difference between the two plans is that Breuer II Revised does not preserve the south facade of the Terminal building. A Certificate of Appropriateness was similarly denied for Breuer II Revised.

At this point, after denial of a Certificate of No Exterior Effect and a Certificate of Appropriateness, owners of landmarks generally would have had available an important administrative remedy: an application for relief (including ultimately the lifting of the landmark restrictions) on the ground of economic hardship. Such relief is denied with respect to the Terminal and its site, however, because this part of the law is so drawn as to exclude from its applicability property having partial real estate tax exemption under § 489-ff of the Real Property Tax Law, relating to commuter railroad real property (Admin.Code § 207-8.0a[2]). Property exempt under Section 489-ff is one of the few types as to which the Landmarks Law withholds relief and the Terminal is the only 489-ff property which has been designated a Landmark.

As a consequence, plaintiffs commenced the instant action for declaratory judgment which resulted in a judgment of the Supreme Court, New York County (Saypol, J.) declaring that the Landmarks Law of the City of New York and

the actions taken pursuant thereto by the Landmarks Preservation Commission as applied to Grand Central Terminal and its site (a) constitute a taking of private property for public use without compensation, and (b) deny to plaintiffs due process of law and the equal protection of the laws. Trial Term in its memorandum decision quoted at length from the supplemental report of former Associate Judge John Van Voorhis of our Court of Appeals, serving as Special Master in the reorganization proceedings involving The New York, New Haven and Hartford Railroad Company in the United States District Court for the District of Connecticut. The following excerpt from that report is particularly relevant:

> "There is, of course, a precedent for this structure in the Pan-American Building located about 200 feet to the north. Whether the opposition to its construction will succeed is not presently known, but it would seem to me, that the probabilities are in its favor. The Grand Central Station is not proposed to be removed. [citation] It is doubtful that the City could insist upon its being maintained at Penn Central's expense as a memorial to the golden age of railroading. The building, as it is, is expensive to maintain, and even under the broad scope of the police power in modern times it is doubtful that it can be so constricted without there being a taking without payment of just compensation as required by the state and federal constitutions. This is particularly true in view of the similarity and close proximity to the Pan-Am Building which, it might be argued, could constitute discrimination denying the equal protection of the law."

Also of particular relevance are the following findings of fact enunciated by Trial Term:

> "9. The Terminal is deteriorating at a substantial rate. The condition of the Terminal was such that repairs

and maintenance work costing approximately $1,278,-135 were necessary in June 1972 .... 25. The Terminal site is a valuable location for an office building. It is in the heart of a commercial area occupied mainly by high-rise commercial structures such as office buildings and hotels .... 31. *If construction of Brewer I had commenced in 1968, the City could have received substantially increased property taxes from commencement of construction.*" (Emphasis supplied).

After further finding that the proposed venture would have been successful and that substantial sums would have accrued to the respective plaintiffs, Trial Term found:

"36. For the years 1967 to 1971, the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal. 37. The net deficit to Penn Central from operating the Terminal was $1,165,470 in 1969 and $1,902,467 in 1971. 38. As of June 1, 1972, the Metropolitan Transportation Authority leased the Terminal and, together with the Connecticut Transportation Authority, receives all revenues from tenants and concessionaires in it (with the exception of any rent Penn Central would receive under its lease with UGP) and has assumed all costs of operating the Terminal. Penn Central is obligated to pay these agencies $4,500,000 a year for the next five years and $2,000,000 thereafter. The Metropolitan Transportation Authority received partial reimbursement for these costs from the City."

In light of the agreement which Penn Central found necessary to make with the MTA and CTA and of the maintenance and operating expenses of the terminal far exceeding actual revenues therefrom, it is averred that the denial of the opportunity to profit from the proposed development leaves Penn Central in a position where it cannot make

any return on the Terminal. Put another way, it is plaintiffs' contention that the application of the Landmarks Law to this parcel in the manner described above, effectively deprives them of the reasonable beneficial use of their property and thus amounts to a taking. It is aptly observed in *Lutheran Church v. City of New York*, 35 N.Y.2d 121, 131, 359 N.Y.S.2d 7, 16, 316 N.E.2d 305, 311 (1974) that "(t)he landmark preservation problem has received considerable comment the net effect of which is general agreement that attempts to designate individual landmarks in high economic development areas is fraught with trouble (see, especially, Costonis, The Chicago Plan: Incentive Zoning And The Preservation of Urban Landmarks, 85 Harv.L.Rev. 574; Wolf, The Landmark Problem in New York, 22 Intramural L.Rev. of N.Y.U. 99)." Although title and use remain in the record owner, *Lutheran Church, supra* recognized that in a particular case the Landmarks Law may operate to so severely restrict free use as to be confiscatory. Essentially this is the manner in which Trial Term viewed the problem presented by the instant action.

The majority cite specific instances in which plaintiffs are alleged to have erred in attempting to carry the burden of proving a net operating deficit. First, it is asserted that the "Statement of Revenues and Costs" for the years 1969 and 1971 improperly attribute a considerable amount of railroad operating expenses to their real estate operations. Certain substantial cost items for 1971, such as "maintenance, repairs and service plant operation", "cleaning", "policing", "materials and supplies" and "utilities", are criticized for being presented as related to the entire Terminal operation rather than segregated as between the railroad and real estate portions thereof. Patently, the tenants and concessionaires who provide the gross revenues of the Terminal are there because the Terminal is an active railroad station and provides a nexus with public transportation via subway and bus, thus insuring the daily passage of thousands of

people. Pragmatically, these tenants and concessionaires can be attracted and retained if the building is operated as a railroad station and is maintained, cleaned, repaired and policed in all its parts. There is, therefore, a basis for claiming that the expense of operating and maintaining the building is a proper expense in ascertaining the profitability or unprofitability of its operation. The insubstantial nature of the criticisms of the "Statement of Revenues and Costs" is evident because excluding all items the defendants, the City of New York and the Landmarks Preservation Commission, claim should be excluded ony reduces the deficit from $1,902,467 to $1,089,672. That alone serves to establish the economic burden borne by the Terminal. Further, though difficult to apportion, it may not be gainsaid that the value of the "real estate" aspect of the Terminal is dependent upon the maintenance of the Terminal as an area which will be visited for purposes other than transportation.

It is next claimed that plaintiffs' failure to impute a rental value to the vast space in the Terminal devoted to railroad purposes is an error vitiating plaintiffs' analysis of the property's capacity to yield a reasonable return. As to this contention, the plain answer is that the defendants' reliance on *Matter of Seagram & Sons v. Tax Comm.*, 14 N.Y.2d 314, 251 N.Y.S.2d 460, 200 N.E.2d 447 (1964) is misplaced. This case dealt not with income from a building, but with the determination of its appraisal value on the capitalization-of-rents method. Obviously, under those circumstances, rent had to be imputed to owner-occupied space in order to have something to capitalize for that portion of the building. That, of course, is not the case here which is concerned with whether the owner is making any return from his use of his property. Indeed, the Landmarks Law itself in defining "reasonable return" states that for such purposes "(n)et annual return shall be the amount by which the *earned income* yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year . . ." (Admin.Code § 207-1.0v[3][a]). (Emphasis supplied). As a matter of economic analysis, the

argument treats the Terminal as if someone had made a gift of it to Penn Central. The fact is that Penn Central paid its own money for the Terminal and to the extent it has been "saved" money for Terminal rental, it has lost the interest it would have made if it had never built the Terminal or had sold it. These figures of rent and interest on the value of the property are economic equivalents (See *La Porte v. State of New York,* 6 N.Y.2d 1, 7, 187 N.Y.S.2d 737, 741, 159 N.E.2d 540, 542 [1959], appeal dismissed, 361 U.S. 116, 80 S.Ct. 207, 4 L.Ed2d 154 [1959]; *Albany Country Club v. State of New York,* 37 Misc.2d 134, 144, 235 N.Y.S.2d 684, 694 [Ct. Claims 1962), modified on other grounds, 19 A.D. 2d 199, 241 N.Y.S.2d 604 [3rd Dept., 1963], affd., 13 N.Y.2d 1085, 246 N.Y.S.2d 407, 196 N.E.2d 62 [1963]). Further, it has been held that the imputation of rent does not create income from property as the term is defined by the Internal Revenue Code (*Harper v. Granger,* 99 F.Supp. 216 [W.D. Pa.1951]). In passing, note is taken of plaintiffs' point that it is ironic to have the argument made in this case that the present Terminal should be assigned an enormous rental value because of the rental vaues for comparable space in mid-Manhattan. Rental values are high in that area in the context of the owners' freedom within the zoning laws to develop their property in profitable ways. At issue here is the application of the Landmarks Law in such manner as to deprive the Terminal of such value. It may well be argued that no one woud pay substantial rentals for a lease of the Terminal when told that the *only* use to which he can put it is an unprofitable railroading use. In this sense the value which defendants would have the Court attribute to the property is precisely the value that they have taken away from it.

Next, it is maintained that plaintiffs have failed to satisfactorily show an inability to increase the Terminal's commercial income by transferring vacant or under-utilized space to revenue producing use. In this context it appears that Penn Central has been assiduous in attempting to in-

crease its Terminal income. Indeed, the commercialization of the Terminal had reached such a point that one of the things discussed in the proceedings before the Landmarks Commission was the desirability of eliminating some of the concessions which have disfigured the building. The simple assertion that there is room for development of additional office space, stores or recreational facilities is highly speculative. As to existing leases, there is nothing to suggest that they were not negotiated at arm's length. As to additional development, it is worthy of note that a proposed bowling alley in place of the waiting room failed of approval by the Public Service Commission. Also, a proposed mall failed of accomplishment because of its impingement upon trackage.

Defendants next assert that the claimed hardship based on deferred maintenance expenses, attributable to the Landmarks Law provision (Admin.Code § 207–10.0) requiring Penn Central to maintain the Landmark is spurious. This assertion is seemingly premised on the argument that the Landmarks Law mandates no more than that required by ordinary prudent management for the preservation of the investment. Maintenance is a prerogative of management. To transform that prerogative into a duty is to clearly lessen Penn Central's estate. It is as though a lien is asserted against the property in the amount necessary to maintain the Terminal and it mandates expenditures whether or not justified by the operating statement. Otherwise stated, ownership entitles one to destroy as well as to preserve. Subject to the law of nuisance, *inter alia,* the vehicle of destruction may be neglect. To require maintenance or improvements may be an idea whose time has come, but it may not be required solely of Landmarks, and not in the context of additional burdens or restrictions upon the parcel which on a pragmatic, economic and financial basis cannot be complied with. Though not here in issue, notice may be taken of the fact that criminal penalties attach to the failure to maintain a Landmark.

It is further asserted by defendants that the agreements with the MTA and the CTA referred to above, were improperly found by Trial Term to impose a loss in that Penn Central must pay additional sums to those agencies. Review of the historical background of those agreements impels the conclusion that defendants' contention is without merit. Approximately two years prior to any agreement with the MTA, Penn Central acquired all the assets of the New Haven Railroad, specifically including all the New Haven's interest in the off-Terminal (Park Avenue) properties. For this interest Penn Central was charged more than $28,000,000. At the same time, Penn Central became responsible for all the operations and operating deficits of the New Haven. Therefore, when Penn Central and the MTA negotiated their agrements, the New Haven was in essence a mere corporate shell. There were no assets of the New Haven to which the MTA could "succeed" and the MTA in fact acquired nothing from the New Haven. Defendants, though acknowledging that all revenue inures to the benefit of the MTA and that all costs are borne by the MTA, aver that the $2,000,000 credit against expenses incurred is in reality a sum due the MTA as the successor in interest to the New Haven. During the time when the New Haven still held an interest in the off-Terminal properties and their revenues, these revenues had been applied towards off-setting the operating deficits of the Terminal and, if any excess remained, the New Haven asserted a claim to a share of the excess. It was thought equitable for Penn Central to contribute towards the operating deficits of the Terminal an amount roughly equivalent to the part of the off-Terminal revenues which had formerly been applied towards New Haven's share of the Terminal expenses. Penn Central's acquisition of the part of the off-Terminal revenues which was "not excess" was accompanied by its assumption of the very expenses (formerly the obligations of the New Haven) against which the non-excess revenues had been applied. No benefit was derived from the simultaneous acquisition of a debit

and a credit in equal amounts. Thus, the credit of $2,000,000 provided by Penn Central to the MTA did not come out of the assets of the New Haven to which the MTA had succeeded and the agreements between Penn Central and the MTA delineate that this credit is to come out of Penn Central's own assets and is specifically applied towards operating expenses of the Terminal.

The other credit of $2.5 Million per year for five years required to be provided by Penn Central in connection with the operation for MTA's account of the Harlem-Hudson Division is not related to the Terminal. The operating agreements were not entered into for the benefit of Penn Central, but for the purpose of maintaining commuter service. While Penn Central may have been able to meet operating deficits, it may also have been able to discontinue commuter service. The $2.5 Million credit was the price it paid for withdrawal from commuter service. Viewed in this context, the credit is chargeable not to the operation of the Terminal, but to the Penn Central itself. However, this does not alter the fact that the several agreements leave Penn Central with no possible source of return from the Terminal, save development rights.

The majority view the plaintiffs as having failed to satisfactorily show that unused development rights over the Terminal could not have been profitably transferred to one or more nearby sites (see, New York City Zoning Resolution, Secs. 74-79, *et seq.*). The Transfer Resolutions authorize the City Planning Commission to grant special permits, if certain conditions are met, allowing the transfer of development rights from a landmark site to adjacent sites. As originally enacted, they neither provided compensation nor significantly mitigated plaintiffs' harm. Defendants acknowledged that development rights are not *ipso facto* equated with compensation when the Zoning Resolution was amended in 1969 to expand the number of sites that could receive transfers of development rights from the Terminal

site. Moreover, as defendants themselves note, the process of transfer is fraught with obstacles. The City Planning Commission and the Board of Estimate must approve. Neighbors may resort to the courts to protest the erection in their vicinity of a structure which does not comport with the Zoning Resolution. For these and numerous other reasons it is difficult to assign a monetary value to the transfer rights. However, not content with merely asserting the general value of transfer rights, defendants detail the economic benefit to be derived from a transfer to the Biltmore Hotel site. This, of course, requires the demolition of the Biltmore Hotel, a viable profit-making entity and ignores the fact that the vast square footage could not be transferred to any adjacent site, unless the Biltmore site was to be occupied by a 103-story structure. In the context of this discussion, it ill-behooves defendants to in effect control the deployment of the Penn Central's financial resources and usurp its management prerogative. In light of the substantial costs that may attend the transfer of development rights because the Landmark owner must submit a program for continuing maintenance of the Landmark as part of his application for the special permit, the value of the development rights are less attractive.

It is, therefore, concluded on the record herein that plaintiffs have sustained their burden of demonstrating that the Terminal site, as restricted, is incapable of producing a reasonable economic return. Concededly the operation of the Terminal represents an economic hardship. Conjecture that Penn Central could have "done better" may not operate as a talisman in the resolution of this matter. It is only required that Penn Central do the best it can. The possible transfer of development rights cannot be viewed under the circumstances herein as offsetting the restrictions placed on the Terminal site. The benefits to both the City and the citizenry to be derived from the designation of the Terminal as a Landmark are self-evident. Yet in the manner of its

application as delineated above, lies the inequity of this particular case. The Terminal is to be preserved in its pristine state for the benefit of all and the bill for this is presented solely to Penn Central. Assuming the Terminal is and represents all that defendants claim (an assumption easily indulged in), the relevant considerations and circumstances may well warrant resort to the power of eminent domain as an appropriate solution. If for cogent reasons resort to such power is not feasible, defendants may have to forego this particular objective. In this connection, it should be noted that Breuer I appears to be more suited to a compromise of the rival interests of defendants and of plaintiffs. Further, if the power of eminent domain is deemed here inappropriate, society is left with an inchoate right.

At this point the following lengthy excerpt from the Court of Appeals opinion in *Forster v. Scott,* 136 N.Y. 577, 583-585, 32 N.E. 976, 977 (1893) is most apt:

> "The constitutional guarantees against the appropriation of private property for public use, except upon just compensation, as well as that against depriving the owner of its enjoyment and possession without due process of law, have been the subject of much judicial discussion in the manifold aspects in which the questions have been presented in the numerous cases. . . . The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. What the legislature cannot do directly, it cannot do indirectly, as the Constitution guards as effectively against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect, authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. (Citations.)
>
> "As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no encumbrance upon it."

Manifestly, the competing meritorious interests of the City and the Landmarks Preservation Commission in seeking to preserve the historical, aesthetic and cultural heritage represented by Grand Central Terminal and the interest of Penn Central as owner in the free use of its property unburdened by restrictions imposed by the former under circumstances and in such manner as to be confiscatory in nature, must be reconciled. It is submitted that given the present economic conditions prevalent in New York City and, indeed in the United States, given the financial situation of Penn Central with due regard for the reasonable

efforts on the part of management to obtain an adequate return on the property at issue, and given the grandeur of the Terminal, somewhat faded in the physical sense but fully vital from an historical and cultural perspective, Breuer I represented a patently good faith effort to do homage to the Terminal within the ambit of its Landmark designation, and at the same time to recognize the prerogative of private ownership and the economic necessities of this commercial parcel.

In the *Amici Curiae* brief submitted on behalf of the Committee to Save Grand Central Station, et al., it is stated that "(r)egulation for the purpose of the preservation of . . . [landmarks] has been upheld in all states where the matter has been tested in court", citing in support of this proposition the following: *City of New Orleans v. Levy,* 223 La. 14, 64 So.2d 798 (1953); *Opinion of the Justices to the Senate,* 333 Mass. 773, 128 N.E.2d 557 (1955); *Opinion of the Justices to the Senate,* 333 Mass. 783, 128 N.E.2d 563 (1955); *City of Santa Fe v. Gamble-Skogmo, Inc.,* 73 N.M. 410, 389 P.2d 13 (1964); *Town of Deering ex rel. Bittenbender v. Tibbetts,* 105 N.H. 481, 202 A.2d 232 (1964); *Rebman v. City of Springfield,* 111 Ill.App.2d 430, 250 N.E.2d 282 (1969); *Bohannan v. City of San Diego,* 30 Cal.App.3d 416, 106 Cal.Rptr. 333 (Ct.App. 4th Dist., 1973). A reading of these cases indicates that, with one exception, each case was concerned with the preservation of a district, not an individual parcel. This is so analogous to zoning that the statutory scheme is oft referred to as zoning. The one exception was a prohibition against the erection of any building within ¼ mile of the town common unless the plans were approved (*Town of Deering ex rel. Btttenbender v. Tibbetts, supra*). Again, hardly the sort of taking here present. We refer again to the Court of Appeals decision in *Lutheran Church v. City of New York, supra,* wherein it was observed in the able opinion, per Gabrielli, J. that zoning regulation is different than, and not to be equated

with, Landmarks Preservation. Nevertheless, the Court proceeded to demonstrate that even zoning is void if confiscatory. Further, it is confiscatory if it may fairly be stated that the regulation serves to add property remaining in private hands to the government's resources. Citing *Forster v. Scott, supra,* the Court also noted that a statute which affects the free use and enjoyment of property or the power of disposition at the will of the owner is "obnoxious to the restraints of the constitution" (*Lutheran Church v. City of New York, supra,* 35 N.Y.2d at p. 130, 359 N.Y.S.2d at p. 15, 316 N.E.2d at p. 311). "What has occurred here, however, where the commission is attempting to force plaintiff to retain its property as is, *without any sort of relief* or adequate compensation, is nothing short of a naked taking" (*Lutheran Church v. City of New York, supra,* at p. 132, 359 N.Y.S.2d at p. 16, 316 N.E.2d at p. 312.) (Emphasis supplied). It thus appears that Mr. Justice Saypol correctly analyzed the opinion of the Court of Appeals and that severe criticism of the Justice in this respect by defendants is unwarranted. Of particular note is the fact that in *Lutheran Church,* the landowner wished to demolish the mansion which had been designated a Landmark and to accomplish this purpose it was necessary to have the "landmark designation" itself removed. It was "uncontested that the existing building [was] totally inadequate for [the landowner's] legitimate needs and must be replaced if [the landowner] is to be able freely and economically to use the premises especially as it appears that adjoining structures have been integrated with [the landowner's] operation" (*Lutheran Church v. City of New York, supra,* at 132, 359 N.Y.S.2d at 17, 316 N.E.2d at 312). However, the declaratory judgment action initiated by plaintiffs herein has its inception not in a desire to demolish the landmark, but rather to alter it; that is, to use it in a manner which will insure a reasonable economic return while preserving the Landmark in a feasible and consonant manner. To phrase it another way: plaintiffs desire to build an office tower *over* the Landmark and

not to remove the Landmark and replace it with such office tower. Consequently, the declaratory relief afforded by the Supreme Court must be viewed as not removing the "landmark designation" from the Terminal, but rather perceived as holding that the manner of applying such designation as above delineated, constitutes a taking of plaintiffs' private property for public use without just compensation. It is beyond cavil that if defendants, especially the Landmarks Preservation Commission, acted favorably in respect of any of the plaintiffs' applications seeking to construct the tower, the instant action would not have been maintained. By virtue of the fact that plaintiffs retained an outstanding architect firm and even submitted Breuer I which retains the famed south facade of the Terminal, their good faith in coming to terms with the landmark designation has been exhibited. The presence of the Pan Am building and the fact that the original plans for the present Terminal envisioned an office tower over such Terminal militate in persuasive fashion against the defendants' intransigent position. In this context, such rigid application of the Landmarks Law designation may well be self-defeating. Self-defeating not only because it calls into question the propriety of such law, but also because the individuals who designed, built, indeed underwrote the great structures now deemed worthy of designation as Landmark, undoubtedly did so for a variety of reasons, among which was their intention to profit therefrom. It is not reasonable to assume that if the result of structural distinctiveness is to be a lessening of the entrepreneurial estate, there may well be no structures to designate as Landmarks in the years to come?

Defendants' claim that Trial Term erred in declaring that the Landmarks Law *as applied* to plaintiffs denies them the equal protection of the laws. It will be recalled that Penn Central is precluded from seeking relief available to others because of its receipt of a partial real estate tax exemption. The statutory scheme, without explanation therefor, treats differently three classes of landmark owners. Penn Central

is relegated to that category which cannot obtain relief from the Landmarks Law. Moreover, as demonstrated by plaintiffs, there is neither a common thread nor a common sense segregation of classes of property. It is this feature which denies to plaintiffs the equal protection of the laws. The power of classification cannot be arbitrarily exercised. The distinctions made must have some reasonable basis (*Rosenthal v. New York,* 226 U.S. 260, 33 S.Ct. 27, 57 L.Ed. 212 [1912]; Cf. *Brown v. Board of Trustees,* 303 N.Y. 484, 104 N.E.2d 866 [1952]).

The remaining contentions raised by defendants have been considered and found to be without merit. Accordingly, the order and judgment of the Supreme Court, New York County (Saypol, J.), entered respectively on January 21, 1975 and February 4, 1975 declaring that the Landmarks Law of New York City and the actions taken pursuant thereto by the Landmarks Preservation Commission as *heretofore* applied to Grand Central Terminal and its site (a) constitute a taking of private property for public use without compensation and (b) deny to plaintiffs due process of law and the equal protection of the laws, should be affirmed, with costs and disbursements.

MARKEWICH, J., *concurs.*

(2)

Order (with Findings of Fact) of the New York Supreme Court, Appellate Division

(Filed April 7, 1976)

At a term of the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, in the County of New York, on the 7th day of April, 1976.

PRESENT:

Hon. Harold A. Stevens, *Presiding Justice.*

Hon. Arthur Markewich, Hon. Theodore R. Kupferman, Hon. Francis T. Murphy, Jr., Hon. Vincent R. Lupiano, *Justices.*

(Caption Omitted in Printing)

The defendants-appellants the City of New York and the Landmarks Preservation Commission of the City of New York having appealed from an order of the Supreme Court, New York County (Saypol, J.), entered on or about January 21, 1975, severing plaintiffs' causes of action for compensation from their causes of action for declaratory and equitable relief, and from a judgment of said Court entered on or about February 4, 1975, adjudging that certain actions of the defendants constitute a taking of private property without just compensation and enjoining defendants from taking said action; and said appeal having duly come on to be heard before this Court, and having been argued by Ms. Nina G. Goldstein, of counsel for the defendant-appellants, and by Mr. John E. F. Wood, of counsel for the plaintiffs-respondents; and due deliberation having been had thereon; and upon the opinion of this Court by Mr. Justice Murphy filed herein and made a part hereof; with two of the Justices dissenting upon an opinion by Mr. Justice Lupiano, and upon the findings of fact made by this Court herein; it is hereby

Ordered and Adjudged that the order and judgment of Supreme Court, New York County (Saypol, J.) entered, respectively, on January 21, 1975 and February 4, 1975, here appealed from, be and the same hereby are reversed, on the law and the facts, with costs; and it is further

Ordered and Adjudged that all declarations of law by the Supreme Court, New York County, accompanying the judgment appealed from be and the same hereby are reversed, on the law and the facts; and it is further

Ordered and Adjudged that all the findings of fact made by the Supreme Court, New York County, accompanying

the judgment appealed from, inconsistent with the new findings of fact set forth in the opinion of this Court, be and the same hereby are reversed, and this Court in lieu thereof makes the following new findings of fact:

1. In recent years, there has been an increasing national growth of interest in preserving irreplaceable buildings and sites which have historical, aesthetic or cultural significance.

2. Urban landmarks are now acknowledged to merit recognition as "an imperiled species." If destruction of such landmarks continues at its present pace, by 1976 the nation will have lost an essential part of its architectural and cultural heritage.

3. The preservation of landmarks in urban areas is of special importance. Grand Central Terminal is an important and irreplaceable component of the special uniqueness of New York City. It is unquestionably one of New York City's best known buildings. Along with the Empire State Building and the Statue of Liberty, the image of its facade symbolizes New York City for millions of visitors and residents.

4. From its formal opening to the public in 1913 (as a replacement for the "Grand Central Depot" built by Cornelius Vanderbilt in 1871) the Terminal has been recognized not only for its architecture, but as a superb example of comprehensive urban design.

5. The need to preserve structures worthy of landmark status is beyond dispute; and the propriety of the landmark designation accorded Grand Central Terminal is essentially unchallenged.

6. Plaintiff Penn Central is the successor to the New York Central Railroad Company and the Pennsylvania Railroad. For purposes herein, "Penn Central" includes its subsidiaries plaintiffs The New York and Harlem Railroad Company and The 51st Street Realty Corporation. Plaintiff UGP Properties, Inc. ("UGP") was incorporated after the

landmark designation here in issue; it is a wholly owned subsidiary of a British Company.

7. Penn Central's losses over the last several years brought it to insolvency and bankruptcy. In order to minimize such losses and provide offsetting revenues, it entered into a lease with UGP in January, 1968, pursuant to which UGP was to erect a tower exceeding 50 stories over the Terminal. UGP undertook to pay to Penn Central $1,000,000 per year during construction and thereafter an amount that was guaranteed to equal not less than $3,000,000 annually. In addition, UGP assumed a portion of Penn Central's real estate taxes estimated at $578,500. These rental payments were to be offset in part by the elimination of approximately $700,000 to $1,000,000 in net rents presently received from concessionairies whose space would be occupied by the proposed new building.

8. Commencing in July, 1968, plaintiffs submitted to the Landmarks Commission several building designs prepared by the architectural firm of Marcel Breuer & Associates (called Breuer I, Breuer II and Breuer II Revised) and requested an appropriate certificate (of no exterior effect or of appropriateness). Plaintiffs have indicated a preference for Breuer II Revised, which would have preserved the Terminal's Main Concourse, but not its famous south facade. On August 26, 1969, a certificate of appropriateness was denied.

9. Grand Central Terminal receives partial real estate tax exemption pursuant to Real Property Tax Law, § 489 ff.

10. The landmark parcel at issue is not devoted to a charitable purpose; and no claim is made that it cannot be used for its prime function—as a railroad terminal.

11. Plaintiffs failed to meet their burden of establishing that they are *incapable* of obtaining a reasonable return from Grand Central Terminal operations.

12. To support the claim that it is actually sustaining a loss from Terminal operations, Penn Central submitted a "Statement of Revenues and Costs" for the years 1969 and 1971. These statements, which were prepared for the instant litigation, improperly attribute a considerable amount of railroad operating expenses (and some taxes) to their real estate operations. For example, the expense items included "Station Master and Staff", "Information Clerks" and "Gate Usher". Such huge cost items (for 1971) as "maintenance, repairs and service plant operation" ($1,141,679), "cleaning" ($632,753), "policing" ($438,566), "materials and supplies" ($69,692), and "utilities" ($660,710) were related to the entire terminal operation and not segregated as between the railroad and real estate portions thereof.

13. No rental value whatsoever was imputed to the vast space in the terminal devoted to railroad purposes. Since Penn Central is in the passenger railroad business it, of necessity, must have a terminal (including trackage, platforms, concourse, waiting rooms, ramps, ticket windows and public amenities) for such service. The reasonable rental value of such space was improperly omitted.

14. Plaintiffs have failed to show that they are unable to increase the Terminal's commercial income by transforming vacant or under utilized space to revenue producing use.

15. Plaintiffs have failed to show that unused development rights over the terminal could not have been profitably transferred to one or more nearby sites.

16. Plaintiffs have failed to show that Penn Central's agreements with the Metropolitan Transportation Authority and the Connecticut Transportation Authority provide a basis for invalidating the Terminal's landmark designation.

17. On the instant record, plaintiffs have failed to meet their burden of proving that the City's Landmarks Law is unconstitutional as applied to them.

18. On the instant record, plaintiffs have failed to meet their burden of demonstrating that the regulation in issue deprives them of all reasonable beneficial use of their property.

And it is further

ORDERED, ADJUDGED and DECLARED that plaintiffs have failed to establish that the New York City Landmarks Preservation Law is unconstitutional as applied to them; and it is further

ORDERED that the Clerk of the County of New York is directed to enter judgment in favor of the defendants-appellants as herein provided, with $60 costs and disbursements of this appeal.

ENTER:

F. T. M.

Justice

APPENDIX C

(1)

Findings of Fact and Declarations of Law of the New York Supreme Court, Trial Term

At a Trial Term, Part XII, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, on the 29 day of May, 1974.

Present: HON. IRVING H. SAYPOL, *Justice.*

PENN CENTRAL TRANSPORTATION COMPANY et al., *Plaintiffs-Respondents,*

v.

The CITY OF NEW YORK and the Landmarks Preservation Commission of the City of New York, *Defendants-Appellants.*

FINDINGS OF FACT

The Court hereby finds as follows:

GENERAL

1. Plaintiff Penn Central Transportation Company ("Penn Central") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with a general office at 466 Lexington Avenue, New York, New York. It is the successor to The New York Central Railroad Company and the Pennsylvania Railroad Company, which were merged as of February 1, 1968.

2. Penn Central was declared bankrupt on June 21, 1970 and has remained bankrupt since that time.

3. Plaintiff The New York and Harlem Railroad Company ("The New York and Harlem") is, and has been at

all times relevant to this action, a corporation organized and existing under the laws of the State of New York with approximately 95% of its stock owned by the Trustees of Penn Central and with a general office at 466 Lexington Avenue, New York, New York.

4. Plaintiff The 51st Street Realty Corporation is, and has been at all times relevant to this action, an indirectly wholly owned subsidiary corporation of Penn Central, organized and existing under the laws of the State of New York with a general office at 466 Lexington Avenue, New York, New York.

5. Plaintiff UGP Properties, Inc. ("UGP") is, and has been at all times since its formation on December 5, 1967, a corporation organized and existing under the laws of the State of New York.

6. Defendant The City of New York (the "City") is a municipal corporation of the State of New York.

7. Defendant The Landmarks Preservation Commission of the City of New York (the "Landmarks Commission") was established as a commission of the City pursuant to Local Law 46 of the City for the year 1965, which amended the Charter and the Administrative Code of the City so as to add to each of them a new Chapter 8-A.

8. Grand Central Terminal (the "Terminal") was constructed in the early 1900's and opened to the public in 1913. It is located in the Borough of Manhattan. The building faces on Forty-Second Street to its south and is bounded on the west by Vanderbilt Avenue at street level. On the east, it adjoins the Commodore Hotel at street level. Above street level it is bounded on its south, east and west by the Park Avenue overhead roadway. To its north, the Terminal is bounded by the Pan Am Building. It is and always has been used in the interstate and intrastate carriage of railroad passengers.

9. The Terminal is deteriorating at a substantial rate. The condition of the Terminal was such that repairs and maintenance work costing approximately $1,278,135 were necessary in June, 1972.

10. The Terminal was originally intended to be a combination railroad terminal and office building. The original plan for the Terminal provided for a 20-story office tower to be constructed on top of the present Terminal and columns were built into the Terminal, which are still in place today, whose purpose is to support such a tower.

11. The land on which the Terminal stands (the "Terminal site") is designated in the Tax Map of the City as Block 1280, Lot 1, Borough of Manhattan.

12. The Terminal and the Terminal site have received partial tax exemption amounting to $11,083,489 since the early 1960's under Section 489ff of the Real Property Tax Law of the State of New York.

13. On August 2, 1967, over Penn Central's objection, the Terminal was designated a Landmark and the Terminal site a Landmark site by the Landmarks Commission.

Ownership and Leasehold Interests in the Terminal Property

14. The ownership and leasehold interests in the Terminal and the Terminal site, held by the respective plaintiffs, are, and have been at all times relevant to this action, unless otherwise noted, as follows:

(a) The New York and Harlem Railroad Company owns the fee;

(b) Penn Central has a lease, expiring in the year 2274 A.D. from The New York and Harlem Railroad Company;

(c) UGP entered into a lease, dated as of January 22, 1968, with The 51st Street Realty Corporation (the

"Lease") which, at that time, had a grant of term of the Terminal and the Terminal site from Penn Central. The 51st Street Realty Corporation assigned all of its interest in the Lease, the Terminal and the Terminal site to Penn Central and The New York and Harlem on July 21, 1969.

15. The Lease was the result of arms-length negotiations and is for a term of 50 years after its commencement date with UGP having an option to renew for an additional 25 years thereafter. Under the Lease, UGP is to construct and operate a multi-story office building on the southerly portion of the Terminal site.

Breuer I, II and II Revised

16. UGP retained the architectural firm of Marcel Breuer & Associates in February, 1968, to design an office building for the Terminal site.

17. By June, 1968, Marcel Breuer & Associates completed the first schematic plans, Breuer I for an office building with 55 office floors which would rise above the Terminal and would preserve the exterior of the Terminal.

18. On July 18, 1968, plaintiffs submitted proposed building plans for Breuer I to the Landmarks Commission and applied for a Certificate of No Exterior Effect permitting its construction. These plans were also filed with the Department of Buildings of The City of New York to obtain zoning approval. The application was denied by the Landmarks Commission on September 20, 1968.

19. Marcel Breuer & Associates following negotiations and discussions between the parties thereafter designed Breuer II, a building with 53 office floors which would have necessitated replacing part of the exterior of the Terminal.

20. On January 20, 1969, plaintiffs applied to the Landmarks Commission for a Certificate of Appropriateness,

under Section 207-6.0 of the Landmarks Law, permitting construction of either Breuer I or Brewer II.

21. Because of the plaintiffs' concern that the possible adverse effect of Breuer II on the City's easement rights in the elevated roadway surrounding the perimeter of the Terminal might be used as a basis for the refusal of a permit to build Breuer II, Marcel Breuer & Associates designed Breuer II Revised which plaintiffs submitted in place of Breuer II. Breuer II Revised was substantially similar to Breuer II, except that it would not encroach upon the elevated roadway. During the course of the proceedings, plaintiffs expressed a preference for Breuer II as revised over Breuer I.

22. Plaintiffs' application for a Certificate of Appropriateness was denied as to both Breuer I and II Revised on August 26, 1969.

23. Breuer II would be 254 feet southerly from the adjoining Pan Am Building; Breuer I and II Revised would be approximately 225 feet southerly from the Pan Am Building.

24. If Marcel Breuer & Associates had begun work on the plans for Breuer II and II Revised at the time that schematic plans for Breuer I were prepared, schematic plans for Breuer II and II Revised could have been completed by June, 1968.

Harm to Plaintiffs

25. The Terminal site is a valuable location for an office building. It is in the heart of a commercial area occupied mainly by high-rise commercial structures such as office buildings and hotels. Any of the plaintiffs' proposed structures over the Terminal site would be directly above a transportation hub of commuter, railroad and subway lines, with ready access internally by occupants of the building to such facilities.

26. In 1968 there was a favorable office rental market in favor of landlords in the Grand Central area. Rental activity for space in an office building on the Terminal site would have started on the basis of architects' plans beginning in June, 1968. Construction of the building would have been completed within three to three and one-half years thereafter.

27. Plaintiffs were prepared to undertake renting and commencement of construction of an office building on the Terminal site in 1968, but were precluded from proceeding because of the defendants' refusal to permit this.

28. Diesel Construction Company, builder of the Pan Am Building, was retained in early 1968 by UGP to construct a building on the Terminal site.

29. Collins, Tuttle & Company, engaged in the sale, rental and management of real estate, was retained by UGP in December, 1967, to rent, obtain financing and as consultant for a building on the Terminal site. Collins, Tuttle & Company began a renting and financing program in early 1968. At that time Collins, Tuttle & Company solicited prospective tenants primarily to lease the space in Breuer I, principally on a single floor occupancy basis, for terms of 20 to 30 years, but these activities were halted due to defendants' denial of a Certificate of No Exterior Effect. Investors financing the building at a favorable interest rate were likewise solicited, but their participation was deferred for the same reason.

30. The total cost of Breuer I would have been $108,554,741, including construction costs of $82,344,400; Breuer II would have cost $106,541,730, of which $77,306,500 would have been construction costs; and Breuer II Revised would have cost $108,486,444, of which $79,365,000 would have been construction costs.

31. If construction of Breuer I had commenced in 1968, the City would have received substantially increased property taxes upon commencement of construction.

32. Under the Lease, Penn Central is to receive $1,000,000 per year during the construction of a building by UGP on the Terminal site. Upon completion, Penn Central is to receive an annual rent of $1.10 per square foot of net rentable space, exclusive of ground floor space, plus $400,000, plus 5% of the gross income, with a guaranteed minimum of $3,000,000 per year. Upon completion of construction Penn Central would have received an annual rent of up to $3,738,977 from Breuer I.

33. As additional compensation to Penn Central, UGP is to pay under the Lease all taxes on the Terminal site considered as unimproved from the time UGP is permitted to construct a building. From June, 1968, through July, 1972, these taxes totaled $1,372,530. UGP is also to pay all taxes on the Terminal (the building) within the area demised to it, thereby reducing the amount of taxes that Penn Central would have to pay on the Terminal.

34. UGP expected to receive a yearly cash flow of at least $2,839,131 from Breuer I upon its completion, $3,325,620 from Breuer II and $3,181,702 from Breuer II Revised. By the end of the first five years, UGP's anticipated aggregate profit would have been $20,495,655 from Breuer I, $22,928,100 from Breuer II and $22,208,510 from Breuer II Revised.

35. Due to defendants' actions preventing plaintiffs from constructing a building on the Terminal site, Penn Central and The New York and Harlem Railroad Company have been deprived of the rent they would have received from UGP and the taxes UGP would have assumed; and UGP has been deprived of the profit it would have made from such a building.

36. For the years 1967 to 1971, the cost to Penn Central of operating the Terminal building itself, exclusive of purely railroad operations, exceeded the revenues received from concessionaires and tenants in the Terminal.

37. The net deficit to Penn Central from operating the Terminal was $1,165,470 in 1969 and $1,902,467 in 1971.

38. As of June 1, 1972, the Metropolitan Transportation Authority leased the Terminal and, together with the Connecticut Transportation Authority, receives all revenues from tenants and concessionaires in it (with the exception of any rent Penn Central would receive under its lease with UGP) and has assumed all costs of operating the Terminal. Penn Central is obligated to pay these agencies $4,500,000 a year for the next five years and $2,000,000 thereafter. The Metropolitan Transportation Authority received partial reimbursement for these costs from the City.

Transfer of Development Rights (Air Rights) Zoning Resolutions 74-79 Through 74-793

39. Zoning Resolutions 74-79 through 74-793 (the "Transfer Resolutions") contemplated compensatory relief for owners of landmarks, including long-term lessees such as UGP, for the taking caused by the designation of such properties as landmarks.

40. As originally enacted in May, 1968, the Transfer Resolutions neither provided compensation to plaintiffs nor minimized the harm suffered by plaintiffs due to the designation of the Terminal as a landmark.

41. The pertinent Transfer Resolutions as last amended in December 1969, although affording increased transfer rights from the Terminal site to other properties owned by Penn Central, do not provide compensation to plaintiffs or minimize the harm suffered by plaintiffs due to the designation of the Terminal as a landmark.

42. The property principally suggested for the transfer of development rights is the present site of the Biltmore Hotel. Development rights could not be economically transferred to the Biltmore site because:

(1) The Biltmore Hotel is and has been a profitable operation.

(2) A building on the Biltmore site could not have been profitable because (a) the ground rent required of UGP by Penn Central for a lease of the Biltmore site was $2,000,000 a year more than in the Terminal lease, and (b) there would have been increased costs of construction, financing, taxes and building operation.

(3) Rents from an office building on the Biltmore site would be significantly lower than from one on the Terminal site which is a superior location.

Declarations of Law

It is hereby concluded and declared that:

1. The Landmarks Law as applied to plaintiffs, and the actions of defendants, constitute a taking of plaintiffs' private property for public use without just compensation, in violation of the Constitution of the United States, Amendments V and XIV, and the Constitution of the State of New York, Article I, Section 7.

2. The Landmarks Law as applied to plaintiffs, and the actions of defendants, deprive plaintiffs of the equal protection of the laws, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 11.

3. The Landmarks Law as applied to plaintiffs, and the actions of defendants, deprive plaintiffs of their property without due process of law, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 6.

4. There is no provision of the Landmarks Law which affords relief to the plaintiffs, with respect to the Terminal or the Terminal site, against the economic hardship which

they have suffered as a result of the defendants' actions under the Landmarks Law. Although Section 207-8.0 of the Landmarks Law affords such relief to landmark owners generally (including ultimately the lifting of landmark restrictions) upon a showing of economic hardship, the provisions of Section 207-8.0a(2) deny such relief to the plaintiffs, whether by way of certificate of appropriateness, notice to proceed or otherwise, because the Terminal and the Terminal site are partially exempted from taxation under Section 489ff of the Real Property Tax Law.

ENTER:

IRVING H. SAYPOL
Irving H. Saypol, J.S.C.

(2)

Order of Severance of the New York Supreme Court, Trial Term

At a Trial Term, Part XII, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, on the 12 day of January, 1975.

Present: HON. IRVING H. SAYPOL, *Justice.*

(CAPTION OMITTED IN PRINTING)

Pursuant to CPLR Rule 5012, it is ordered that plaintiffs' causes of action for compensation for the taking of their property are severed from their causes of action for declaratory and equitable relief, that jurisdiction of the causes of action for compensation is reserved in this Court, and that decision with respect to the right to compensation and the amount of compensation, if any, is deferred pending completion of appellate review of the final judgment to be entered herein upon the causes of action for declaratory and

equitable relief or expiration of the time for such review without an appeal having been taken, or until further order of this Court.

Enter:

IRVING H. SAYPOL
Irving H. Saypol, J.S.C.

Filed

Jan 21 1975

New York
County Clerk's Office

(3)

Memorandum Decision of the New York Supreme Court, Trial Term

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM—PART XII

(CAPTION OMITTED IN PRINTING)

SAYPOL, J.:

This is an action for declaratory judgment. In addition to the admitted allegations of the complaint and the facts found as indicated in the accompanying marked findings, presentation here is greatly facilitated in the following excerpted recitals from the supplemental report of former Associate Judge John Van Voorhis of our Court of Appeals serving as special master in related debtor reorganization proceedings in the United States District Court, District of Connecticut.

Plaintiff Penn Central Transportation Company (Penn Central) controls co-plaintiff New York and Harlem Railroad which owns the fee of Grand Central Terminal located on 42nd Street in the heart of Manhattan in one of the most valuable commercial areas in the world, surrounded by multi-story office buildings and similar structures. Penn Central has a 300-year lease from New York and Harlem Railroad. Penn Central's wholly owned subsidiary, co-plaintiff 51st Street Realty Corporation, has a grant from Penn Central for a term co-terminous with a lease from 51st Street Realty Corporation to co-plaintiff UGP Properties Inc., the latter under its lease undertaking to erect and operate a multi-story office building over the Terminal. When the Terminal was erected the plan and construction of its foundation contemplated the future super-imposition of twenty stories over the Terminal. In this background, the following is from Judge Van Voorhis' report:

"IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

No. 30226

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor

SUPPLEMENTAL REPORT OF SPECIAL MASTER RESPECTING DEBTOR'S RIGHT, TITLE OR INTEREST IN THE GRAND CENTRAL TERMINAL PROPERTIES

This report, as authorized June 25, 1968 at New Haven, by the United States District Court for the District of Connecticut, Honorable Robert P. Anderson, United States Circuit Judge, sitting by designation, supplements the report previously submitted by me as Special Master under date of June 17, 1968.

• • •

The most important development since April 19, 1965, • • • has been the lease agreement between a Penn-Central subsidiary and a corporation known as UGP Properties, Inc. of the air rights above the Grand Central Terminal building for the construction of a proposed fifty-five story office building planned (according to a press release mentioned by Penn-Central's counsel) to have 1.9 million square feet of office space. The lease agreement is in evidence, marked BH 1, A, B, C, and provides for the payment of 1 million dollars annual rent for four years and thereafter at a $1.10 per square foot of net rentable space, exclusive of ground floor space, which may from time to time exist in the new building plus $400,000 per annum all payable monthly in [6075] advance. The term of the lease is 50 years. The tenant agrees to pay the taxes and an additional percentage rent of 5 per cent of gross income which, plus the flat rent, is guaranteed to be not less than 3 million dollars per year commencing not later than four years after the commencement date of the lease. It was conceded that the plans for this proposed building, designed to float over the Terminal building, comply with the existing regulations of the City Planning Commission and the zoning regulations. This lease was, to be sure, delivered to the tenant subject to a letter providing that if the tenant has used its best efforts 'to obtain a certificate of appropriateness or notice to proceed from the Land-

marks Preservation Commission* and has failed after appropriate order of the Supreme Court of the State of New York and provided, further, that there exists an outstanding designation by the Landmarks Preservation Commission of Grand Central Terminal as a landmark, Tenant and said Sublandlord shall have the right to rescind Lease and Sublease, respectively, by giving to Landlord ten days' written notice of such intention', and in exerting its 'best efforts' the tenant is required to file an application with the Landmarks Preservation Commission prior to August 1, 1968 and to bring an action or proceeding through counsel approved by the landlord against any adverse ruling by the Landmarks Preservation Commission. The landlord is given the right to rescind the lease if the tenant has not obtained this result by January 1, 1970 [extended by agreement of the parties until July 1, 1975] and upon any rescision [sic] of the lease the tenant is required to assign to the landlord its interest in any action or proceeding pending in the New York Courts relating to the application of the Landmarks Preservation Commission or relating to the designation of Grand Central Terminal as a landmark or pertaining to any rights or entities under the statute pursuant to which Grand Central Terminal is designated a landlord [landmark]. In event of adverse decision the landlord is authorized to appeal and the tenant is required to cooperate with the landlord in all matters pertaining to any such action or proceeding. When asked at the hearings whether Penn-Central had abandoned this project, the answer was unqualifiedly 'No'. Counsel for Penn-Central informed the Court on May 8, 1968, in the earlier hearings that an Article 78 proceeding

* Pursuant to Chapter 8-A of the N.Y. City Administrative Code §§ 205-1.0 through 207-21.0.

[this plenary action for declaratory judgment instead] has been commenced by Central to contest the designation of Grand Central Station as a landmark, and that that this suit includes a test of the constitutionality of the Landmarks Preservation Act which is subdivision 25-a of the General City Law providing that cities are empowered:

> 'To provide, for places, buildings, structures, works of art, and other objects having a special character or special historical or aesthetic interest or value, special conditions or regulations, for their protection, enhancement, perpetuation [6086] or use, which may include apropriate and reasonable control of the use or appearance of the neighboring private property within public view, or both. In any such instance such measures if adopted in the exercise of the police power, shall be reasonable and appropriate to the purpose, *or if constituting a taking of private property shall provide for due compensation which may include the limitation or remission of taxes.*' [Emphasis supplied] [1]

The New York City Landmarks Preservation Commission is constituted pursuant to sections 205-207 of the New York City Charter constituting Chapter 8-A added by local law No. 46, April 19, 1965. The constitutionality, in certain situations of the Landmarks Preservation Act was upheld at special term in Manhattan Club v. Landmarks Preservation Commission, 51 Misc 2d 566 and but [sic] not in Trustees of Sailors Snug Harbor v. The Landmarks Preservation Commission 53 Misc 2d 933.* A landlord has been held to

[1] [former General City Law § 20, subd. 25-a, repealed L. 1968, c. 513, §2; similar provision is now General Municipal Law § 96-a, L. 1968, c. 513, § 3]

* "The regulation imposes so disproportionate a burden upon the landowner that it must be set aside in this case as an unlaw-

be entitled to test the constitutionality as applied to his property by action for a declaratory judgment (Lutheran Church in America v. New York, 27 App. Div. 2d 237). The same statute was obliquely involved in Keystone Associates v. Moerdler, 19 N. Y. 2d 78, (although there it was a different statute which was held to be unconstitutional), wherein an injunction was denied to restrain the demolition of the old Metropolitan Opera House. The Court said: 'It is not necessary, at this time, to enter into a discussion of the Landmarks Preservation Law or any other statute which appears to have been enacted in the exercise of the police power.'

If this new project is accomplished, it appears likely to add at least $2,300,000 to the annual income of the Terminal Account. The parties stipulated that the facts stated at pages 600-05 of the transcript of the hearing held before me on May 8, 1968 are correct, and it was indicated at page 601 that the rent for these air rights would be in part offset by the displacement of some stores and concessions in the Terminal building now bringing in approximately $700,000 per year. This apparently refers to stores on 42nd Street and some concessions in the waiting room entrance and on the south wall of the main rotunda of the station.

There is, of course, a precedent for this structure in the Pan-American Building located about 200 feet to the north. Whether the opposition to its construction will succeed is not presently known, but it would seem to me, that the probabilities are in its favor. The

---

ful taking of property without just compensation [citing cases]'': Last paragraph of opinion.

Grand Central Station is not proposed to be removed. [6087-6088] It is doubtful that the City could insist upon its being maintained at Penn Central's expense as a memorial to the golden age of railroading. The building, as it is, is expensive to maintain, and even under the broad scope of the police power in modern times it is doubtful that it can be so constricted without there being a taking without payment of just compensation as required by the state and federal constitutions. This is particularly true in view of the similarity and close proximity to the Pan-Am Building which, it might be argued, could constitute discrimination denying the equal protection of the law. If, under a reorganization plan, all right, title and interest of New Haven in the GCT properties is to be transferred to Penn-Central, a large potential increase in the surplus revenue to be computed of the Terminal Account should result from these valuable air rights. The fairest way might be to insert a provision in the reorganization plan and purchase agreement which would require substantially more to be paid for New Haven's rights if a building is erected above the Grand Central Station.

• • •

Dated: July 22, 1968

Respectfully submitted,

JOHN VAN VOORHIS
Special Master''

Lutheran Church *supra* cited in Judge Van Voorhis' report ultimately was resolved by a divided court, 42 A D 2d 547, the majority rejecting the landmarks designation as an abuse of administrative discretion, the minority disagreeing saying that the majority decision constituted the substitution of judicial for administrative discretion. When Trus-

tees of Sailors' Snug Harbor *supra*, Judge Van Voorhis, reached the Appellate Division, 29 A D 2d 376 (relied on here by both sides) it was held that the state had the power to restrict use for the cultural and aesthetic benefit of the community where the conditions exist favoring such a restriction and where Constitutional rights are not infringed. But, continued Associate Justice Aaron Steuer for the unanimous court:

> "Conceding the validity of regulation, the question presented is whether in the particular instance regulation goes so far that it amounts to a taking (Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415). If it does, it is constitutionally prohibited (Vernon Park Realty v. City of Mount Vernon, 307 N.Y. 493, 498). Chapter 8-A [Administrative Code of the City of New York] provides some guidelines as to what constitutes an undue burden on commercial realty and provides relief in such instances (§ 207-8.0, subd. a). • • • *The criterion for commercial property is where the continuance of the landmark prevents the owner from obtaining an adequate return.*" (Emphasis supplied)

The New York City Landmarks Law distinguishes between a landmark and a landmark site which is defined as:

> "• • • An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter." [2 New York City Administrative Code Ch. 8A, § 207-1.0(1)]

It then provides that:

> "• • • [I]t shall be unlawful for any person in charge of a landmark site • • • to alter, reconstruct or demolish any improvement constituting a part of such

> site • • • or to construct any improvement upon land embraced within such site • • • or to cause or permit any such work to be performed upon such improvement or land, unless the commission has previously issued a certificate of no exterior effect, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued." [§ 207-4.0(a)(1)].

It also mandates:

> "• • • a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.
>
> "b. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair." [§ 207-10.0]
>
> • • •
>
> "• • • [I]t shall be unlawful for any person in charge of any improvement located on a landmark site or in an historic district to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work." [§ 207-9.0]

Violations of § 207-4.0, § 207-9.0 or § 207-10.0 are subject to criminal penalties as provided in § 207-16.0.

Summarizing, the owner of a landmark site is prohibited from making any changes not only to a landmark on the site, but also to any other improvement on the landmark site without express Landmarks Commission approval. The landmark may not be replaced with a structure permitted under the zoning law of the City; it is prohibited to add another structure on the site which would not even touch the landmark, or from making a slight change in the exterior of any improvement on the site; one may not construct fences or barriers around his property to exclude intruders; he may not even replace multipane windows on non-landmark buildings on a landmark site with picture windows. The list is virtually endless. In short one is limited to maintaining all of the property in its original condition as of the time of designation as a landmark site at one's own expense. Such a severe restriction on the use and enjoyment of property, it is argued by the plaintiffs, constitutes a taking of property as a matter of law.

The clerk is now directed to file the annexed findings of fact, judgment and order of severance.

The findings of fact and conclusions of law and the judgment were completed and signed on May 29, 1974, after review with counsel in extensive hearings. Filing was withheld, however at the request of the parties. Meanwhile the Court of Appeals decided Lutheran Church v. City of N.Y. on July 25, 1974 (35 N Y 2d 121). Gabrielli, J., for the majority of the Court, held that landmarks designation generally constitutes a taking for which compensation is mandated. What was said for the majority and for the dissenters in Lutheran, supra, as to the lack of findings of fact is not present here. The findings here adequately cover such elements as economic hardship, lack of compensatory alternative to alleviate economic hardship, inadequacy of relief by tax rebate, etc., etc. This establishes unconstitutionality of the statute as applied.

Aesthetics is not for decision here. However, beauty or art deserving preservation where those competent in the field might disagree would not be for a court's conclusion. Visualized in the mind's eye, looking up South Park Avenue towards Grand Central Station, set as it is in a canyon surmounted by sky scrapers with the Pan American Building immediately behind it, it looks like part of that Pan American Building. More closely viewed, surrounded as Grand Central is by the heavily travelled roadway around its perimeter on three sides, it leaves no reaction here other than that of long neglected faded beauty. The point of decision here is that the authorities empowered to make the designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers.

Declaration is for the plaintiffs invalidating the designation on Constitutional grounds. On the agreement of the parties the defendants' order of severance is signed, reserving the question of damages.

Dated: January 21, 1975.

JHS
J. S. C.

(4)

Judgment of the New York Supreme Court, Trial Term

At a Trial Term, Part XII of the Supreme Court of the Stat of New York, held in and for the County of New York at the Courthouse thereof, on the 29 day of May, 1974.

Present: Hon. Irving H. Saypol, *Justice*.

(Caption Omitted in Printing)

The issues in the above-entitled action having duly come on for trial before the Hon. Irving H. Saypol without a jury

at a Trial Term, Part XII, of this Court, held at the Courthouse thereof, and the allegations and evidence of the parties having been heard, and a severance having been ordered pursuant to CPLR Rule 5012 severing plaintiffs' causes of action for compensation from their causes of action for declaratory and equitable relief, and the Court having made and signed its findings of fact and declarations of law,

Now, it is Ordered, Adjudged, Decreed, and Declared, that:

1. Chapter 8-A of the Charter and Administrative Code of the City of New York (the "Landmarks Law") as applied to plaintiffs, and the actions of defendants under the Landmarks Law with respect to the property designated in the Tax Map of the City of New York as Section 5, Block 1280, Lot 1, Borough of Manhattan, or any improvements thereon (the "Property"), constitute a taking of plaintiffs' private property for public use without just compensation, in violation of the Constitution of the United States, Amendments V and XIV, and the Constitution of the State of New York, Article I, Section 7.

2. The Landmarks Law as applied to plaintiffs, and the actions of defendants under the Landmarks Law with respect to the Property, deprive plaintiffs of the equal protection of the laws, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 11.

3. The Landmarks Law as applied to plaintiffs, and the actions of defendants under the Landmarks Law with respect to the Property, deprive plaintiffs of their property without due process of law, in violation of the Constitution of the United States, Amendment XIV, and the Constitution of the State of New York, Article I, Section 6.

4. Defendants are permanently enjoined from using or threatening to use the Landmarks Law or any provision thereof, or from taking any action thereunder, to prevent,

impede or obstruct, directly or indirectly, the construction, use or occupancy, of an otherwise lawful improvement on the Property.

5. The plaintiffs shall recover of the defendants the costs and disbursements of this action to be taxed by the clerk of the Court.

Enter:

IRVING H. SAYPOL
Irving H. Saypol, J.S.C.

Filed

Feb 4—1975

New York
County Clerk's Office

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION and UGP PROPERTIES, INC., *Appellants,*

—against—

THE CITY OF NEW YORK and THE LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK, *Appellees.*

Notice of Appeal to the Supreme Court of the United States

NOTICE IS HEREBY GIVEN that the appellants above named hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals, State of New York, entered in this action on June 23, 1977 affirming an order of the Appellate Division of the State of New York, First Department, which reversed on the merits an order of the Supreme Court, New York County, and granted judgment in favor of appellees dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. §1257(2).
Dated: August 31, 1977.

/s/ Carl Helmetag
CARL HELMETAG, ESQ.
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1700 Market Street
Philadelphia, Pa. 19103
/s/ Covington & Burling
COVINGTON & BURLING
888 Sixteenth St. N.W.
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20 Exchange Place
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Attorneys for Appellants

To: CLERK OF THE SUPREME COURT
NEW YORK COUNTY

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Municipal Building
New York, N.Y. 10007

Attorney for Appellees

APPENDIX E

(1)

CHAPTER 8-A
PRESERVATION OF LANDMARKS AND HISTORICAL DISTRICTS

§ 205-1.0 **Purpose and declaration of public policy.**—a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world-wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history; (b) safeguard the city's historic,

aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

§ 207-1.0 **Definitions.**—As used in this chapter, the following terms shall mean and include:

a. "Alteration". Any of the acts defined as an alteration by the building code of the city.

b. "Appropriate protective interest". Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.

c. "Capable of earning a reasonable return". Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.

d. "City-aided project". Any physical betterment of real property, which:

(1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or other mode of financial assistance, exercise of the city's powers of eminent domain, contribution of city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission". The landmarks preservation commission.

f. "Day". Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 207-16.0 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes; provided however, that the term "improvement parcel" said• also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as an interior landmark pursuant to the provisions of this chapter.

• So in original. Should probably be "shall".

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development heritage or cultural characteristics of the city, state or nation and which has been designated as a landmark pursuant to the provisions of this chapter.

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials comprising an improvement including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 207-18.0 of this chapter the surfacing, resurfacing, painting, renovating, restoring, or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

(1) work done on any improvement; or

(2) replacement of any part of an improvement; for which a permit issued by the department of buildings

is not required by law, where the purpose and effect of of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally entitled upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 207-8.0 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the City, which is in effect at the time of the filing of the request for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed

valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as the result of a transaction at arms' length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission,

may have a bearing upon the question of financing; and

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 207-8.0 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years or older, which has or have a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

§ 207-2.0 **Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts.** —a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate, and as herein provided in subdivision j in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of scenic landmarks, located on property owned by the city, which are identified by a description setting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of such subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 207-17.0. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision d.

e. Subject to the provisions of subdivisions g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the health services administration.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to such board a report with respect to the relation of such designation or amendment thereof to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved.

(2) Such board may modify or disapprove such designation or amendment thereof within ninety days after a copy

thereof is filed with the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to such board a report with respect to the relation of such proposed rescission to the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the resolution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to paragraph a shall be made pursuant to notices of public hearings given, as provided in § 207-12.0.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic district or any amendment of any such designation or rescission thereof the commission shall cause to be recorded in the office of the register of the city of New York in the county in which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the borough and county of Richmond in the office of the clerk of said county of Richmond, a notice of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers and its tax map, block and lot number or numbers and in the case of all other counties, by its land map block and lot number or numbers.

§ 207-3.0 **Scope of commission's powers.**—a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the

construction, reconstruction, alteration, demolition or use of such improvement, or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

§ 207-4.0 **Regulation of construction, reconstruction, alterations and demolition.**—a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic district of any part of an improvement containing an interior landmark, to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause or permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision a of section 207-17.0 of this chapter, or to any city-aided project, or in cases subject to the provisions of section 207-11.0 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 207-17.0 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The appli-

cant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application, or amended application every such applicant shall file with the commission, a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application.

§ 207-5.0 **Determination of request for certificate of no effect on protected architectural features.**—a. (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files, a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done, and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certificate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application.

§ 207-6.0 **Factors governing issuance of certificate of appropriateness.**—a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 207-5.0 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 207-8.0 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work

in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 207-3.0 of this chapter and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 207-3.0 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or construction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the commission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features, together with such effects, and the exterior architectural features of the landmark and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.

§ 207-7.0 **Procedure for determination of request for certificate of appropriateness.**—The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 207-8.0 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

§ 207-8.0 **Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return.**—a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom; the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 207-6.0 of this chapter, shall, within ninety days after the filing of the request

for such certificate of appropriateness, makes a preliminary determination of insufficient return.

(2) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or sections 458, 460 or 479 of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to Sections 420, 422, 424, 425, 426, 427, 428, 430, 432, 434, 436, 438, 440, 442, 444, 450, 452, 462, 464, 468, 470, 472 or 474 of the real property tax law and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) the owner of such improvement has entered into a bonafide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) the improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted

when acquired unless such owner is no longer engaged in pursuing such purposes; and

(d) the prospective purchasers or tenant:

(1) in the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1) preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its

preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing fiscal year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this

subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unles he files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefited by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejection filed with the commission. If such an acceptance is filed, the commission shall deny the request of such applicant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The Commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c, and d of this section within the period of time prescribed by such subdivision d; or

(b) the commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) a plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commision may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a

specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall

endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a purchaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one-hundred-eighty-day period following the commission's preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one-hundred-eighty-day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant

obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona fide assignee, successor, lessee or sub-lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ 207-9.0 **Regulation of minor work.**—a. (1) Except as otherwise provided in section 207-11.0 of this chapter, it shall

be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work.

(2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as is practicable, certify to the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application as hereinafter provided.

c. (1) The commission shall determine:

(a) whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an his-

toric district or interior architectural feature of an improvement containing an interior landmark; or

(b) If such work would have such effect, whether judged by the standards set forth in subdivision b, c, d and e of section 207-6.0 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision e in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as prescribed in subparagraph two of subdivision a of section 207-5.0 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 207-17.0 of this chapter and to any city-aided project.

§ 207-10.0 **Maintenance and repair of improvements.**—a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof, which if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair.

§ 207-11.0 **Remedying of dangerous conditions.**—a. In any case where the department of buildings, the fire department or the health service administration, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.

§ 207-12.0 **Public hearings; conferences.**—a. The commismission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part

of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof on the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or their last known address or addresses, as the same appear in the records of the office of the city director of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notice shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property.

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence, provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 207-5.0 and 207-9.0 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the improvement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the city director of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 207-13.0 **Extension of time for action by commission.**—Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work, the applicant may extend such period of time by his written consent filed with the commission.

§ 207-14.0 **Determinations of the commission; notice thereof.**—a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination and of any preliminary determination of insufficient return made pursuant to paragraph (1) of subdivision a of section 207-8.0 of this chapter to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 207-3.0 of this chapter, any determination of the commission granting a certi-

ficate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivision g of section 207-8.0 of this chapter.

§ 207-15.0 **Transmission of certificates and applications to proper city agency.**—In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to article seven of the zoning resolution, the commission shall transmit such certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be.

§ 207-16.0 **Penalties for violations; enforcement.**—a. Any person who violates any provision of subdivision a of section 207-4.0 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 207-9.0 of this chapter or any provision of section 207-10.0 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty-five dollars or by imprisonment for not more than

thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any person who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, wilfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 207-4.0 of this chapter or paragraph two of subdivision a of section 207-9.0 of this chapter or any violation of the provisions of section 207-10.0 of this chapter, shall constitute a separate violation of such provisions.

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

§ 207-17.0 **Reports by commission on plans for proposed projects.**—a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark; shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within 45 days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a city-aided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the commission a report on such plans proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within 45 days after such referral.

c. Except as provided in subdivision d of section 207-2.0, where the commission so requests, plans for the construc-

tion, reconstruction • alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within 45 days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to conform with applicable laws concerning regulation of lots, storm water disposal and water courses. The administrator of the parks, recreation and cultural affairs administration may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record.

§ 207-18.0 **Regulations.**—The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, subject to the provisions of § 207-3.0 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions of an historic district and may vary from area to area in their provisions.

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 207-8.0 of this chapter; and

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter,

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• So in original.

including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ 207-19.0 **Investigations and reports.**—The commission may make such investigations and studies of matters relating to the protections, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks and scenic landmarks as the commission may from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate.

§ 207-20.0 **Applicability.**—a. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where, a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation or amended or modified designation pursuant to the provisions of section 207-2.0 of this chapter, first making the provisions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located.

§ 207-21.0 **Separability.**—If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.

(2)

New York City Zoning Resolutions 74-79 Through 74-793 •

74-79

Transfer of Development Rights from Landmark Sites.

In all districts except R1, R2, R3, R4, or R5 Districts or C1 or C2 Districts mapped within such districts, for new *developments* or *enlargements*, the City Planning Commission may permit development rights to be transferred to adjacent lots from lots occupied by landmark buildings, may permit the maximum permitted *floor area* on such adjacent lot to be increased on the basis of such transfer of development rights and may permit, in the case of residential *developments* or *enlargements*, the minimum required *open space* or the minimum *lot area per room* to be reduced on the basis of such transfer of development rights, and may permit [minor] variations in the front height and setback regulations for the purpose of providing a harmonious architectural relationship between the *development* or enlargement and the landmark building.

For the purposes of this Section, the term "adjacent lot" shall mean a lot which is contiguous to the lot occupied by the landmark building or one which is across a *street* and opposite to the lot occupied by the landmark building, or, in the case of a *corner lot*, one which fronts on the same *street* intersection as the lot occupied by the landmark building; **it shall also mean in the case of lots located in C5-3, C5-5, C6-6, C6-7 or C6-9 Districts a lot contiguous or one which is across a *street* and *opposite* to another lot or lots which**

• Matter in regular Roman type was in the resolutions as adopted on May 22, 1968. Matter in bold-face Roman type was added on December 4, 1969; matter in brackets, adopted on May 22, 1968, was deleted on December 4, 1969. Matter in italics is defined in Section 12-10 of the Zoning Resolutions and is not reproduced here.

except for the intervention of *streets or street* intersections from a series extending to the lot occupied by the landmark building. All such lots shall be in the same ownership (fee ownership or ownership as defined under *zoning lot* in Section 12-10).

A "landmark building" shall include any structure designated as a landmark by the Landmarks Preservation Commission and the Board of Estimate pursuant to Chapter 8-A of the New York City Charter and the Chapter 8-A of the New York City Administrative Code, but shall not include *public parks*, any structures within *public parks* or historic districts, those portions of *zoning lots* used for cemetery purposes, statutes, monuments, bridges or any structures owned by or on land owned by city, state or Federal governments or their agencies.

The grant of any special permit authorizing the transfer and use of such development rights shall be in accordance with all the regulations set forth in Section 74-791 (Requirements for application), 74-792 (Conditions and limitations), and 74-793 (Transfer instruments and notice of restrictions).

* * *

74-791

Requirements for application.

An application to the City Planning Commission for a grant of a special permit to allow a transfer of development rights and construction based thereon shall be made by the owners of the respective *zoning lots* and shall include: a site plan of the landmark lot and the adjacent lot including plans for all *development* on the adjacent lot; a program for the continuing maintenance of the landmark; and such other information as may be required by the City Planning Commission. The application shall be accompanied by a report from the Landmarks Preservation Commission.

A separate application shall be filed for each independent "adjacent lot" to which development rights are being transferred under this Section.

74-792

Conditions and limitations.

1. For the purposes of this Section, except in C5-3, C5-5, C6-6, C6-7 or C6-9 districts, the "basic maximum allowable *floor area*" for a *zoning lot* occupied by a landmark shall be the maximum *floor area* allowed by the applicable district regulations on maximum *floor area ratio* or minimum required *open space ratio* and shall not include any additional *fill or area* allowed for *plazas*, *arcades*, or *plaza* connected open areas or any other form of bonus whether by right or special permit.

2. The maximum amount of *floor area* that may be transferred from any *zoning lot* occupied by a landmark building shall be computed in the following manner:

(a) the basic maximum allowable *floor area* that could be built for *buildings* other than *community facility buildings* under existing district regulations on the same *zoning lot* if it were undeveloped.

(b) less the total *floor area* of all *buildings* on the landmark lot.

(c) The figure computed from (a) and (b) above shall be the maximum amount that may be transferred to any one or number of adjacent lots. [The transfer once completed shall irrevocably reduce the amount of *floor area* that can be developed upon the landmark lot by the amount of *floor area* transferred. In the event that the landmark's designation is removed or, if the landmark building is destroyed, or if for any other reason the landmark building is *enlarged* or the landmark lot is redeveloped, the landmark lot can only be developed up to the amount of permitted *floor area* as reduced by the transfer.]

(d) Development rights to unbuilt but allowable *floor area* may be transferred from one or any number *zoning lots* occupied by a landmark building to one or any number of *zoning lots* adjacent to the

landmark lot so as to increase the basic maximum allowable *floor area* that may be developed on such adjacent *zoning lots*. For each such adjacent *zoning lot* the increase in *floor area* allowed under the provisions of its section shall in no event exceed the basic maximum allowable *floor area* by more than 20 per cent.

3. When "adjacent lots" are located in C5-3, C5-5, C6-6, C6-7 or C6-9 districts and are to be developed with *commercial buildings* the following conditions and limitations shall apply:

(a) the maximum amount of *floor area* that may be transferred from any *zoning lot* occupied by a landmark building, shall be the maximum *floor area* allowed by Section 33-120.5 for *commercial buildings* on said landmark *zoning lot*, as if it were undeveloped, less the total *floor area* of all existing buildings on the landmark *zoning lot*.

(b) for each such adjacent *zoning lot* the increase in *floor area* allowed by the transfer of development rights under this Section shall be over and above the maximum *floor area* allowed by the applicable district regulations.

(c) the Commission may require where appropriate, that the design of the *development* include provisions for public amenities such as, but not limited to, open public spaces, subsurface pedestrian passageway leading to public transportation facilities, plazas and arcades.

4. In any and all districts, the transfer once completed shall irrevocably reduce the amount of *floor area* that can be developed upon the lot occupied by a landmark by the amount of *floor area* transferred. In the event that the landmark's designation is removed or if the landmark building is destroyed, or if for any other reason the landmark building is *enlarged* or the landmark lot is redeveloped, the lot occupied by a landmark can only be developed up to the amount of permitted *floor area* as reduced by the transfer.

5. As a condition of permitting such transfers or development rights, the Commission shall make the following findings:

(a) that the permitted transfer of *floor area* or [minor] variations in the front height and setback regulations will not unduly increase the *bulk* of any new *development*, density of population or intensity of use in any *block*, to the detriment of the occupants of *buildings* on the *block* or nearby *blocks* and

(b) that the program for continuing maintenance will result in the preservation of the landmark.

The City Planning Commission shall give due consideration to the relationship between the landmark building and any new *buildings* developed on the adjacent lot regarding materials, design, scale, and location of *bulk*.

The City Planning Commission may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area.

74-793

Transfer instruments and notice of restrictions

The owners of the landmark lot and the adjacent lot shall submit to the Commission a copy of the transfer instrument legally sufficient in both form and content to effect such a transfer. Notice of the restrictions upon further development of the [landmark lot] **lot occupied by the landmark** and the adjacent lot shall be filed by the owners of the respective lots in the place and county designated by law for the filing by the owners of the respective lots in the place and county designated by law for filing of deeds and restrictions on real property, a certified copy of which shall be submitted to the Commission.

Both the instrument of transfer and the notice of restrictions shall specify the total amount of *floor area* to be transferred, **and shall specify by lot and block numbers, the lots from which and the lots to which, such transfer is made.**

APPENDIX F

Constitutional Provisions

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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AMENDMENT XIV

SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.